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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-763

Aubrey Grossman,

Petitioner,

v.

Donald Striepeke, Sheriff of County of Sonoma, State of California,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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v.

Donald Striepeke, Sheriff of County of Sonoma, State of California,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioner, Aubrey Grossman, respectfully prays that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 20, 1974.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 8, 1974. A timely petition for rehearing was denied on November 20, 1974. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. Did the Court of Appeals erroneously limit its reconsideration of petitioner's contempt conviction to the issue of embroilment and thus deprive petitioner of the right to a hearing as

announced by this Court in Taylor v. Hayes, 418 U.S. ____, 94 S. Ct. 2697 (1974)?

II. Did the Court of Appeals properly apply the embroilment test as articulated in Taylor?

III. Whether the contempt conviction and the State Court of Appeal opinion here violate petitioner's First and Fourteenth Amendment rights; chill the exercise of all attorneys in all cases, and particularly those of defense attorneys in controversial criminal and political cases and thus impermissibly threaten the independence of the bar, vigorous advocacy, and the Sixth and Fourteenth Amendment rights of criminal defendants and other litigants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The case also involves the following statutes of the State of California:

California Business and Professions Code Section 6068:

> "It is the duty of an attorney:
> ...
> (b) To maintain the respect due to the courts of justice and judicial officers
> ...
> (f) To abstain from all offensive personality..."

California Code of Civil Procedure, Section 1209:

> (1) "The following acts or commissions in respect to a court of justice, or proceedings therein, are contempts of authority of the court: 1. Disorderly, contemptuous, or insolent behavior toward the

judge while holding the court, tend-tending to interrupt the due course of a trial or other judicial proceeding.

...

(3) Misbehavior in office, or other wilful neglect or violation of duty by an attorney."

California Code of Civil Procedure, Section 1211:

"When a contempt is committed in the immediate view and presence of the court...it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed."

The case also involves Federal Rule of Criminal Procedure, 18 U.S.C. 52(B):

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Aubrey Grossman, was cited for contempt during trial when he was defense counsel for seven American Indians in the matter of People v. Stra, et al., No's 34644, 34746, 34751 in the Municipal Court of the Central Judicial District, County of Sonoma, State of California. Petitioner was later, at the end of the trial, finally adjudicated and sentenced to the maximum possible penalty by the trial judge before whom the alleged contempt occurred. Petitioner was denied a right to a hearing at that time.

This case was previously before this Court during the 1973 October term on a petition for writ of certiorari to the

United States Court of Appeals for the Ninth Circuit, and this Court vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of this Court's decision in Taylor v. Hayes, 418 U.S. ___, 94 S. Ct. 2697 (1974). A true copy of said order is attached here as Appendix A. The opinions of the Court of Appeals for the Ninth Circuit from which review was sought in the earlier petition for writ of certiorari, and from which review is again herein sought, are attached hereto as Appendix B and Appendix C. respectively.

On August 8, 1974, the Court of Appeals for the Ninth Circuit, per Judges Koelsch, Browning and Carter, issued an

order affirming that Court's judgment affirming the District Court's denial of a writ of habeas corpus. On remand from this Court the Court of Appeals reaffirmed its view that the trial judge was not "personally embroiled" and further, that Taylor was only relevant to petitioner on the issue of embroilment, although this Court specified no such limitation in its remand. A true copy of the Court of Appeals order is attached hereto as Appendix D.

On September 23, 1974, petitioner petitioned the Court of Appeals for a rehearing, with suggestion that the case be heard en banc. Petitioner therein urged that the Court was in error in failing to reconsider petitioner's case

in light of Taylor's holding that when a contemnor is not finally adjudicated and sentenced until after trial, he is entitled to a hearing even though he was cited for contempt during trial.

On November 20, 1974, the Court of Appeals issued its order denying the petition for rehearing and rejecting the suggestion for a rehearing en banc, on the grounds that petitioner failed to raise the hearing issue in his original appeal, and that the error in question did not constitute plain error. A true copy of said order is attached hereto as Appendix E.

Petitioner now renews his petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, seeking review of all opinions

below:

The Court of Appeals Order of November 20, 1974 re-instated that Court's opinions of July 11, 1973 (attached hereto as Appendix B) and August 17, 1973 (attached hereto as Appendix C) which in turn, affirmed the opinion of the California Court of Appeal, First District, Division Two, In re Grossman, reported at 24 C.A.3d 624 (1972) and attached hereto as Appendix H. The Court of Appeals for the Ninth Circuit adapted the facts as stated in the California Court of Appeal decision and incorporated the reasoning in that court's opinion as part of the opinion of the Court of Appeals.

B. FACTS

Petitioner was the attorney for seven American Indians charged with trespassing on federally owned land. Petitioner's clients had peacfully entered upon a portion of their ancestral lands which had been declared by the government to be surplus. At the time of the trespass, which lasted less than one day, the government was undecided as to which American Indian organization or individuals the land should be given. The defendant's viewed their activities as a petition to the government to cede that portion of the land to them.

Petitioner was sixty years of age and had practiced law in the State of California and in the federal courts of the Ninth Circuit for thirty-five years.

He was well known in the state for his defense of criminal defendants in controversial political cases and particularly, in recent years, for his representation of American Indian tribes, councils, and individuals in California. He was, and is, nationally known as an advocate of American Indian rights, and as an attorney who takes on many pro bono criminal cases, particularly where the defendants are seeking to exercise First Amendment rights.

Twice before, in the year before the occupation in question in Stra, the federal government had treated Indian occupation of surplus land in Northern California as petitions on the part of the Indians by awarding such surplus

land to the occupying Indians. The occupation in Stra in fact resulted in the award of the particular land defendants were charged with illegally occupying to an Indian organization created by petitioner's clients.

Trial commenced on November 16, 1971. At approximately 3:40 p.m. on Friday, Novemeber 19, 1971 there occurred the incident which resulted in petitioner's being held in contempt. The trial judge excused the jury at 3:50 p.m., cited petitioner for misconduct, and put over further proceedings on the matter of petitioner's alleged contempt until the end of the trial, and recessed the court at 3:55 p.m.

Commencing Monday morning November

22, 1971, the trial continued without further incident, and was concluded on the afternoon of Tuesday, November 23, 1971.

The defense of the Indians in Stra was that they had occupied United States Government land which they had the right to occupy. After direct testimony by defendant Arthur Hernandez, the prosecutor asked the witness about other indcidents in which he had been involved where Indians had occupied land claiming it was Indian land. The Reporter's Partial Transcript of the proceedings in the Municipal Court of the State of California, Central Judicial District, Countv of Sonoma on Order of Contempt of petitioner, is attached as Appendix I.

Hernandez answered the question and identified the various incidents where this had occurred.

The prosecutor then stated:

> "All right. So you basically travel around the country, occupying property that..."

Hernandez attempted to object to this characterization and to explain what he felt was involved in these "occupations". Petitioner did not object to the prosecutor's opening up this subject but indicated he would give Hernandez an opportunity to explain it on redirect examination. When petitioner attempted to explain on redirect, the prosecutor objected.

The judge, enquiring, but not ruling on the prosecutor's objection, asked:

> "What has that to do with the issues in this case?"

Petitioner, having first argued relevance, now expressed his frustration with the fact that the prosecutor had introduced the subject and then objected to it, thusly:

> "Well, then, why did he ask it? I've said it before: If he's willing to open up an irrelevant field, then I'm entitled to re-direct or on cross to go into the same field, unless there's a different rule for him than for me."

To this the court stated:

> "Mr. Grossman, you know better than that."

And to this petitioner replied:

> "I don't know better than that. so don't say I know better than that...I say what I believe. Don't say I know better than that. You're saying I'm a liar. I'm not a liar, Judge. Don't

say I know better than that."

This constituted the entire incident which gave rise to the contempt conviction.

Trial continued without further incident, and the defendants were convicted. After dismissal of the jury, the judge referred to the incident of the previous Friday, stated he had prepared an Order of Contempt, which he then read from the Bench, holding the petitioner in contempt.

The order alleged that petitioner was in contempt in that he:

> "(1) After having been repeatedly admonished by the Court to refrain from such activity and comment, continued to argue after the above-mentioned ruling of the Court had been made and announced.

(2) In a loud, disorderly and contemptuous, insolent and rude manner and tone of voice and in the presence of the jury, accused the Court of exercising different standards of judgment in favor of the prosecution and against the defense in determining the admissibility of proferred evidence.

(3) In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, falsely accused the Court of calling him a liar.

That said act and words were grossly contemptuous of the orderly process and dignity of the Court, and tended to and did, interrupt the due course of the trial."

The trial judge then fined petitioner $500.00 and sentenced him to five days in jail, the maximum possible sentence under state law. The judge then delivered a copy of the Order to petitioner, and without giving him an opportunity to be heard, stated that the court stood recessed. Petitioner

attempted to move the Court 1) for an opportunity to be heard by way of legal argument and on the facts, 2) to withdraw the judgment and set the charge for a hearing, 3) to obtain a tran script of the portion of the proceedings relevant to the alleged contempt so that he could prepare for the hearing, 4) to have the matter heard before another judge because of the personal involvement of the court.

Although petitioner requested it, no transcript was available at the post-trial proceedings. It could have refreshed the judge's recollection, for example, as to just what was said. The contempt citation alleged that petitioner's language:

"unless there's a different rule ..."(emphasis added) falaely accused the court of exercising different standards of judgment in favor of the prosecution and against the defendant in determining the admissibility of proffered evidence.

The trial judge in the case had exhibited feelings of hostility to petitioner prior to the commencement of the trial. On August 27, 1971, when the case was before him in order to set a trial date, the judge remarked to co-counsel, apropos of petitioner having filed a federal removal petition:

> "[I]nital charages here were made in November of 1970 and I have on prior occasions had some rather strong words with Mr. Grossman concerning possible date of trial and I promised him that the matter was going to trial and rather promptly.

> Mr. Grossman had used every tactic that is available and some not too ethical, I believe, to delay the setting of these cases for trial."

After the judge had set a tentative trial date, he remarked:

> "Mr. Grossman has done everything to attempt to clog the wheels of justice in this County in any event."

Petitioner had subtly felt the prejudice, tension and dislike of the judge throughout the pre-trial proceedings and the trial. When the judge stated, in response to petitioner's ineptly phrased "unless there's a different rule," "Mr. Grossman, you know better than that", petitioner felt he was being called a liar by the court. He defended himself with the language which forms the basis of the

contempt citation.

The trial court further exhibited hostility to petitioner at the conclusion of the trial. Judge Jones summarily denied all petitioner's motions for hearing before another judge, for a transcript, and a stay, and ordered petitioner immediately remanded to the custody of the sheriff. Petitioner's co-counsel moved the court for a stay of 10 days within which to prepare appellate proceedings, and this too was denied, and petitioner was taken into custody.

After serving several hours, petitioner was released from custody the same day by order of a judge of the Superior Court of Sonoma County. Peti-

tioner remained free on recognizance by order of that court pending final determination of the state court proceedings.

On December 30, 1971 petitioner filed petition for writ of habeas corpus in the California Court of Appeal, seeking review of the order of the Municipal Court. On January 3, 1972, Division Two of that court denied the writ without a hearing. Petitioner then sought a writ of habeas corpus from the Supreme Court of California, and on February 9,1972, that Court issued an order to show cause returnable before the Court of Appeal, which Court issued its decision (Appendix H herein) which annulled the first specification of contempt, but affirmed the second and third.

On May 10, 1972 petitioner filed a petition for hearing in the California Supreme Court seeking review of the decision of the Court of Appeal. That petition was denied on May 23, 1972. On July 5, 1972 petitioner appeared in the Municipal Court again for resentencing, after remand from the Court of Appeal. The same judge resentenced petitioner to the same term of five days in the county jail, again fined him $500.00, and again denied requests for stay so that petitioner could apply to the federal courts. During the federal proceedings, after several stays, petitioner surrendered to respondent Sheriff, served the balance of the five day sentence in the county jail, and paid the $500.00 fine.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRONEOUSLY LIMITED ITS RECONSIDERATION OF PETITIONER'S CONTEMPT CONVICTION TO THE ISSUE OF EMBROILMENT, AND THUS DEPRIVED PETITIONER OF THE RIGHT TO A HEARING AS ANNOUNCED IN TAYLOR v. HAYES.

1) The right to a hearing as announced in Taylor was raised by petitioner, both in the trial court and in his appeal to the Court of Appeals.

a. In the trial court:

After the conclusion of the trial, Judge Jones, on November 23, 1971, resumed the matter of petitioner's alleged contempt. After reading the

contempt citation, and before giving petitioner a chance to be heard, Judge Jones sentenced petitioner and ordered the court recessed. Petitioner then made three objections to the Judge's action. Petitioner asked a) that he be afforded a hearing at which he could assert a defense, both as to the facts and on the law, b) that he be given a transcript and a reasonable time to prepare for the hearing, and c) that because of his personal embroilment with petitioner Judge Jones recuse himself, and that the hearing petitioner was requesting be had before another judge. Judge Jones denied these motions on the grounds that since the alleged contempt was committed in the view of the court, summary proceed-

ings were appropriate and thus petitioner was not entitled to a hearing of any kind.

In the Response to the earlier petition for writ of certiorari before this Court, the Attorney General contended that this interchange between petitioner and Judge Jones in fact constituted a hearing in satisfaction of the requirements of Groppi v. Leslie, 404 U.S. 496 (1972). This contention was and is totally without merit, for it can hardly be maintained that petitioner was granted a hearing in the same breath as his explicit (identical)

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1. The relevant portions of the trial transcript are set forth as Appendix I herein.

for a hearing was being denied.[2] Nevertheless, the Attorney General acknowledges that petitioner did claim a right to a hearing. The transcript of the proceeding in the Municipal Court shows that from the very beginning petitioner's right to a hearing was properly raised. The issue ultimately discussed in Taylor was brought into focus below by the trial court's denial of a hearing on the grounds that petitioner's conduct allegedly constituted "direct contempt". Thus, petitioner pursued both the embroilment issue, and, in less precise form because the prior law was ambiguous,

2 Since Taylor had not yet been decided, the scope of the hearing to which petitioner was entitled was not clear. It is clear, however, that the issue of petitioner's claim to, and right to a hearing, was raised, and joined.

the right to a hearing. Indeed, it could not logically be any other way, for unless petitioner had a right to a hearing in the first instance, it would have been pointless to have argued the embroilment issue, which turns on the right to a hearing before another judge.[3]

b) In the original appeal to the Court of Appeals.

(1) Since petitioner's position in the trial court, and on appeal, was that Judge Jones had become personally

3 This point was urged by petitioner, (but rejected by the Court of Appeals) in the petition for rehearing following this Court's remand. As was also argued to the Court of Appeals, the point is implicit in this Court's remand itself. For what point could there be, to remand for reconsideration in light of the embroilment issue in Taylor, if the right to a hearing, announced in Taylor, did not first apply? (See p. 46 below).

embroiled with him, his claim of a right to a hearing tended to merge with his claim to have that hearing before an impartial judge. However, in retrospect foreshadowing this Court's decision in Taylor, petitioner framed the first issue presented on appeal as follows:

> [whether] "When a state court judge who has become personally embroiled with a trial attorney waits until the end of a criminal trial to sentence the attorney for contempt, is the judge required by the Due Process Clause of the Fourteenth Amendment to recuse himself and order that a hearing as to the alleged contempt be held before another judge?" (Appellant's Opening Brief in the Court of Appeals, p. 1., emphasis added.)

Thus, recognizing that the leading case on embroilment at that time, Mayberry v. Pennsylvania, 400 U.S. 455 (1971), seemed to allow a trial judge, under extreme

circumstances, to deal summarily with direct contempt during trial, even if he was embroiled, petitioner sought to distinguish his case from that rule on the grounds that in the instant case the trial judge cited petitioner for contempt during trial, but deferred final adjudication and sentencing until the end of trial.[4] In such a situation, petitioner maintained, even though his alleged contempt was "direct" he was nonetheless entitled to a hearing.

4 It is precisely this distinction upon which this Court focused in Taylor in limiting the use of the summary contempt power (94 S. Ct., at 2702, 2703). In this respect Taylor appears to disapprove sub silentio, any indication to the contrary in Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973) cited on this issue by the Attorney General in opposition to the original Petition for Certiorari (at p. 17).

(2) In petitioner's Statement of the Case in the original appeal to the Court of Appeals, it was emphasized that after the trial judge had ordered the court recessed,

> "Appellant immediately objected, stating that he had not been permitted an opportunity to be heard by way of legal argument or factual presentation, and moved that because of personal involvement of the judge with appellant, any contempt proceeding should be heard before another judge." (Appellant's Opening Brief, Court of Appeals, p. 8).

Thus here again, petitioner was clearly asserting both his right to a hearing, and the right to have that hearing before another judge.

(3) Finally, in his argument to the Court of Appeals petitioner addressed himself directly to the trial court's

contention that a hearing of any kind, let alone before another judge, was not required. Noting that this Court, in Sacher v. United States, 343 U.S. 1 (1952), had approved summary procedures even when the judge waited until the end of the trial to impose punishment, petitioner went on to argue that later decisions had eroded this rule:

> "Less than three years later, [this] court, speaking through Mr. Justice Frankfurter, reinstated the embroilment rule that had been discarded in Sacher. See Offutt v. United States, 348 U.S. 11 (1954). The Offutt court based its reversal upon the clear embroilment of the trial judge and the alleged contemnor. It therefore did not discuss the contention made by [this] court, in Sacher that a trial judge does not lose his ability to deal summarily with an alleged contemnor by waiting until the end of the trial. However, subsequent decisions

> have noted that once a trial has ended, much of the justification for summary procedure vanishes, and the right to a hearing before an impartial judge comes into play [citations]."(Appellant's Opening Brief to the Court of Appeals, p. 13, line 18 - p. 14, line 1, emphasis added).

Again, at p. 19, lines 4-15, petitioner argued:

> "Although it is possible that the exigencies of a situation may require that a trial judge act immediately to deal with contempt and not disqualify himself even where personal antipathy exists, such was not the case here. The incident that was characterized as contemptuous occurred on November 19. Although the trial judge on that date stated that he found petitioner guilty of contempt no punishment was imposed by the court until November 23rd, after the trial had ended. The trial being over, there was no reason why the trial court could not have ordered petitioner to show cause before a different judge why he should not be held in contempt."

Thus petitioner clearly raised, in his original appeal to the Court of Appeals, the issue of his right to a hearing notwithstanding that his alleged contempt was "direct". And petitioner grounded this argument in the very distinction which this Court, in Taylor, makes between summary punishment during trial, and summary punishment after trial, where the alleged contemnor is only cited during trial.

If, arguendo, there is any doubt at all, as to whether the issue was raised by petitioner, that doubt should have been resolved in petitioner's favor. For as this Court noted in Taylor, 94 S. Ct. at 2703, citing Sacher, 343 U.S., at p. 8, "[s]ummary punishment always, and

rightly, is regarded with disfavor..."

As this Court reiterated in Taylor:

> "For the accused contemnor facing a jail sentence, his 'liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.'". 94 S. Ct. at 2704.

Such fundamental due process rights cannot be allowed to be forfeited on the slender thread of ambiguity. The Court of Appeals was thus in error when it failed, on its reconsideration of petitioner's case as directed by this Court, to afford petitioner the benefit of a right to a hearing as announced in Taylor, on the ground the issue had not been raised on the original appeal to that court.

2) The Error Complained of is Plain Error.

a. The error complained of is of Constitutional dimension, goes to the heart of the fact-finding process, and affects substantial rights of petitioner.

This Court has held that under the "plain error" rule:[5]

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken if the errors are obvious, or if they otherwise seriously effect the fairness, integrity or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157 (1936).

The courts, however, have had great

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5 The plain error rule as thus explained has since been codified in Federal Rule of Criminal Procedure 52(B), as a restatement of previous law. See United States v. Jeffery, 473 F.2d 268 (1973) at p. 271, fn. 2.

difficulty formulating guidelines to govern the application of this rule, leading one noted commentator to remark:

> "... the cases give the distinct impression that 'plain error' is a concept appellate courts find impossible to define, save that they know if when they see it." Wright, Federal Practice and Procedure, Vol. 3, p. 373.

The courts have been more inclined to notice as plain error those errors which involve infringement of Constitutional rights. Thus in Government of Virgin Islands v. Smith, 445 F.2d 1089 (1971), the court reversed on its own motion a conviction for tax evasion where counsel failed, at the trial and on appeal, to raise the defense of double jeopardy. See also United States v. Miller, 468 F.2d 1041 (4th Cir. 1972), and United

States v. Lopez, 414 F.2d 272 (2nd Cir. 1969). The mere fact that a Constitutional right is in issue, does not without more, create plain error. See Shaw v. United States, 403 F.2d 528 (1968). Plain error must relate to basic fairness of the trial. As explicated in those cases to which the Court of Appeals refers in its recent review of the plain error rule in United States v. Jeffery, 473 F.2d 268 (9th Cir. 1972)[6], the constitutional error found not to constitute plain error related to extrinsic policy considerations justifying the exclusionary rule rather than to the basic fairness of the trial. See, e.g. Billeci

6 See footnotes #2 and #3 where that court defends the "miscarriage of justice" test for what constitutes plain error.

v. United States, 290 F.2d 628 (9th Cir. 1961) where evidence was erroneously admitted, because illegally seized, but without objection. The Court of Appeals refused to notice the error because:

> "... it is difficult to see how such an error seriously affected the 'fairness, integrity, or public reputation of judicial proceedings' [citing United States v. Atkinson, supra]. Evidence which is the product of an illegal seizure is not denied admission in a federal criminal proceeding becuase it is necessarily untrustworthy, but rather it is excluded on the grounds of public policy to discourage overzealous law enforcement officers from resorting to police state tactics [citations]." 290 F.2d at 629. See also United States v. Shelly, 447 F.2d 455 (1971).

But the failure to object is immaterial where it "...affected the integrity of the fact finding process..." United

States v. Vaughn, 443 F.2d 92 (2nd Cir. 1971). Moreover, Court of Appeals for the Ninth Circuit itself has on its own motion, dealt with an error which deprived a contemnor of due process quite like the error complained of here. Thus in Weiss v. Burr, supra, the Court vacated a contempt adjudication because of denial of the right to allocution before sentencing in accordance with Groppi v. Leslie, supra. The Court noted that Weiss did not raise this issue, 484 F.2d at 984, fn. 20, but the Court considered it anyway, because the right to be heard is one of the most fundamental principles in Anglo-American law, and was implicit in Weiss' broad attack on the Constitutionality of the procedure whereby he

was convicted. In a previous case the same court indicated that it would consider as plain error exclusion of evidence which was material to the defense. United States v. Eskridge, 456 F.2d 1202 (9th Cir. 1972). In United States v. Jeffery, supra, the same Court adopted the "miscarriage of justice" test as to what constitutes plain error, and in Weiss the Court explained at great length the fundamental importance to justice of a hearing, in both civil and criminal cases (484 F.2d at 985, fn. 24). In the present case petitioner was denied the right to a hearing at which he might argue the facts (i.e. "put in his evidence") and the law, as it applied to those facts (i.e. the transcript). In

the light of Taylor the hearing petitioner requested is now as much a part of due process for contemnors as was the right to allocution when the Court of Appeals for the Ninth Circuit decided Weiss. Thus even assuming, arguendo, that petitioner did not clearly raise this issue in his original appeal, the Court of Appeals was in error here in failing to follow its own prior decisions applying the plain error rule.

This Court has, in Silber v. United States, 370 U.S. 717 (1962), a Congressional contempt case, used the plain error rule in a situation closely analogous to the case at bar. There the defendant was convicted of Congressional contempt for refusal to answer questions

before the House Committee on UnAmerican Activities. At trial he moved to dismiss the complaint on the grounds that it did not identify the subject under inquiry when he refused to answer. The District Court denied the motion and the issue was not raised again in either the Court of Appeals or in this Court. This Court invoked the plain error rule and reversed the judgment of conviction, relying on a case (Russell v. United States, 369 U.S. 749 (1962)) decided after Silber had been argued.[7] Thus where a question of procedural due process was involved, this Court used the plain error rule and applied it retroactively. Similarly,

7 Silber was argued on April 19, 1962. Russell was decided on May 21, 1962, and Silber was decided on June 25, 1962.

although petitioner maintains he did raise the issue on his appeal to the Court of Appeals, there can be no doubt that, as did Silber, petitioner made his initial request to the trial court. His request for a hearing was based on substantially the same argument this Court adopted in Taylor, but of course petitioner could not have relied on Taylor below. This Court has described the rights announced in Taylor as "...fundamental due process protections for contemnors..." (94 S. Ct. at 2704). Certainly in the light of Silber, and the numerous other cases hereinabove discussed, it was erroneous for the Court of Appeals not to have applied the plain error doctrine here, and its failure to

deal with this issue on its reconsideration perpetuated a miscarriage of justice in this case.

3) It is respectfully submitted that this Court's Order of Remand of this case for reconsideration by the Court of Appeals, in the light of Taylor v. Hayes, must have intended the right to a hearing announced in Taylor to apply.

In Taylor this Court held (a) that when a judge defers "final adjudication and sentencing" of contempt committed in his presence during trial, due process of law requires that the contemnor "... should have reasonable notice of the specific charges and opportunity to be heard in his own behalf" (94 S. Ct. 2703) and, (b) that a trial judge may become

embroiled with the contemnor to an extent which requires him to recuse himself even though the contemnor does not vilify the judge in the sense required by Mayberry v. Pennsylvania, supra.[8] The Court of Appeals, however, explicitly announced, in affirming its prior opinion:

> "Taylor is relevant to only one of the issues before this court: whether the trial court judge was so 'personally embroiled' that due process required trial of the contempt charge before another judge." (See Appendix B).

The Court of Appeals, in thus holding, implicitly agreed with the argument of the Attorney General opposing the grant of certiorari, that the issues of petitioner's right to a hearing, with a

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8 Part I of the Taylor opinion is clearly not relevant to the present case, since petitioner was sentenced to five days in jail.

specification of the charges, and rights to a transcript, and an opportunity to be heard on the facts and the law, were not properly before this Court. But petitioner respectfully submits this Court rejected that argument. For had this Court intended reconsideration solely on the embroilment issue it is respectfully submitted that the Order would have explicitly so stated. An analysis of the Taylor opinion itself makes clear that unless this Court intended the Taylor holding on the right to a hearing issue to have been applicable to petitioner, it would have been pointless to have remanded for reconsideration in light of Taylor at all.

In Taylor this Court first found

(Part II) that notwithstanding the fact that Taylor was cited for contempt during trial he was still entitled to a hearing, at which a transcript should be made available, where he could argue, for instance, that the behavior was not in fact contemptuous. This was exactly petitioner's point in the instant case. Taylor was based on the view that

> "The usual justification of necessity, see Offutt v. United States, 348 U.S. 11, 14 (1954) is not nearly so cogent when final adjudication and sentence are postponed until after trial." 94 S. Ct. at 2703.

Taylor thus narrowly interpreted the circumstances under which a contemnor could be dealt with "summarily", noting that even in Sacher v. United States, 343 U.S. 1 (1952), where the concept of summary

punishment received its first, and last, judicial blessing, the Court cautioned that "...summary punishment always, and rightly, is regarded with disfavor." (94 S. Ct. at 2703). The sequence of events leading to Taylor's contempt conviction is essentially identical to the situation in the instant case. Although petitioner's behavior should not, as a matter of law, have been found contemptuous (in some contrast to that of petitioner in Taylor), in both cases the procedures leading to the contempt conviction were the same. The contemnor was cited during the trial, but final adjudication and sentencing were deferred. Thus the embroilment issue could only be reached after the initial decision that a

contemnor in such a circumstance is entitled to a hearing in the first instance. Part III of Taylor begins:

> "We are also convinced that if petitioner is to be tried again he should not be tried by respondent." (94 S. Ct. 2704).

This issue could not have been reached absent an initial decision that a contemnor in similar circumsta ces was entitled to a hearing.

Thus if the Taylor decision is to have any relevance to petitioner at all, it is respectfully submitted that it must be because this Court intended to say, contrary to the view of the trial judge and the Attorney General: petitioner was entitled to a hearing notwithstanding that his alleged contempt was "direct". To assume that this Court remanded only

on the embroilment issue would be absurd since it would direct the Court of Appeals to consider whether the trial judge should have recused himself from a hearing he was not required to give. The Court of Appeals' position on remand, therefore, is not only contrary to fairness, common sense and traditional practice, but is inconsistent with the logical structure of the Taylor opinion itself.

4) The Taylor rule should be applied to petitioner, since his case was pending when Taylor was announced.

The doctrine announced by this Court in Linkletter v. Walker, 381 U.S. 618 (1965) requires that petitioner be afforded the right to a hearing described in Taylor. In the frequently-cited Linkletter case this Court declined to make

the rule of Mapp v. Ohio, 367 U.S. 643 retroactive because it was designed to deter future police conduct. See also Desist v. United States, 394 U.S. 244 (1969) where the same logic was used when the court declined to make Katz v. United States, 389 U.S. 347 (1969) retroactive. In Linkletter (381 U.S. at 639) this Court noted that were the issue involved the "...very integrity of the fact finding process" full retroactivity would be required. See also Ivan v. New York, 407 U.S. 203 (1972) holding In re Winship, 397 U.S. 358 (1970) fully retroactive (requiring proof beyond a reasonable doubt in juvenile delinquency adjudicatory hearings) and Roberts v. Russell, 392 U.S. 293 (1968) holding fully retroactive the rule in Bruton v. United

States, 391 U.S. 123 (1968):

> "...the error 'went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination of his guilt or innocence." (392 U.S. at 294).

This view of retroactivity has recently been reaffirmed by this Court in Michigan v. Payne, 412 U.S. 47 (1973). The Court of Appeals for the Ninth Circuit recognized this rule in United States v. Bowen, 500 F.2d 960, 981 (1974).

The rights to a hearing and notice (in this case notice would be incorporated in the transcript) are fundamental rights, essential to insure that the court adjudicating the contempt is in the best position to determine the facts. If in this case petitioner had been granted the hearing he requested at the trial level,

the conviction might well never have occurred at all. As the transcript (later obtained) shows, the exchange between the trial judge and petitioner which gave rise to the contempt citations was extremely ambiguous. The judge thought petitioner was accusing him of being discriminatory in his rulings. Petitioner thought the judge was accusing him of being a liar. Had a transcript been available at a hearing, and both judge and lawyer read exactly what had been said in the heat of the moment, perhaps the apology requested by the judge would have been forthcoming, and perhaps the judge would have been more understanding of petitioner's misunderstanding. Perhaps the judge would have seen there was no contempt meant by petitioner at

all. There was nothing here of the vilification present in Mayberry, certainly less objectionable behavior than in Taylor, and nothing like the disruptions in United States v. Dellinger et al., 461 F.2d 389 (7th Cir. 1972). There was, instead, a misunderstanding, a lack of communication, arising out of an attorney's attempt to defend his client, and to defend himself when he thought his own integrity was under attack.

This was, in fact, a classic situation in which an impartial hearing would have best served the interests of justice, rather than the resort to the awsome and necessarily swift power of summary contempt. In such a situation it would be a miscarriage of justice not to apply Taylor to petitioner, especially since

petitioner's case was pending in this Court when Taylor was decided. See United States v. Martinez-Tapia, 499 F.2d 1244, at 1245 (9th Cir. 1974). As this Court said in Taylor: that "The provision of [such] fundamental due process protections for contemnors accords with our historic notions of elementary fairness." (94 S. Ct. at 2704). Elementary fairness, and long-established precedents to retroactivity, require that Taylor be fully applicable to petitioner.

II. THE COURT OF APPEALS DID NOT PROPERLY APPLY THE EMBROILMENT TEST AS ARTICULATED IN TAYLOR.

Both in Taylor, and by its remand of petitioner's case, the convictions of Taylor and petitioner were characterized as procedurally defective. This Court

found that the judge in Taylor was embroiled even though the contemnor did not conduct himself in a manner sufficiently contemptuous to bring Mayberry into play. The present case was remanded for reconsideration specifically in light of the expanded embroilment test of Taylor. In Taylor this Court found as evidence of a "running controversy" with the lawyer-contemnor the fact that the trial judge had early in the trial made disparaging remarks about Taylor's integrity (94 S. Ct. 2705). Here the trial judge had early accused petitioner of practices "not too ethical". In Taylor and this case the judges gave

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9 The reference was to petitioner's attempts to remove the proceedings to federal court. See Declaration filed in State appeal, Appendix J herein.

maximum sentences and refused bail pending appeal. In both cases the contemnors were denied a reply to the judge's charges. The procedural facts of the two cases are almost identical, and the judges' responses from the beginning are remarkably similar.

In opposing the original Petition for Certiorari the Attorney General argued both that petitioner's statements constituted contempt because they allegedly forced the court to recess 10 minutes early, and this disrupted the trial; and also that the same remarks were not sufficiently outrageous so as to have embroiled the judge. This inconsistency is heightened by the Court of Appeals' affirmance on remand. For under Taylor the test for embroilment is whether the

"total circumstances" require recusal (94 S. Ct. 2705, fn. #10). In this context if this Court finds that there was not, as a matter of law, embroilment on the part of the trial judge, petitioner would submit that on these facts neither could there have been any contempt on the part of petitioner.[10]

10 Should this Court not itself reverse petitioner's conviction, nor find as a matter of law the trial judge was embroiled and should have recused himself, it is respectfully submitted that petitioner must be offered a hearing before another judge. For if petitioner is to be afforded an impartial hearing de novo as required by Taylor, it would be fundamentally unfair to have that hearing before a judge who has already convicted and sentenced him. Added weight is given to this consideration by the fact that when this case was originally sent back to the trial court for resentencing by the State Court of Appeal after that court rejected the first of three citations the trial judge resentenced petitioner to the same sentence, the maximum under state law.

Judge Jones was clearly embroiled with petitioner within the meaning of Taylor. Recessing the contempt proceedings at 3:08 p.m. on November 23, 1971, the judge refused petitioner a stay of even five minutes to telephone a Superior Court judge in the same building to request a stay and a release upon his own recognizance, or to telephone his office or home to obtain a toothbrush.

There is nothing in this record to justify the judge's pre-trial remarks that petitioner had used some devices "not too ethical" in the pre-trial proceedings. The judge resisted every requested continuance, and made personal investigations to check upon petitioner's statements as to his trial dates in other courts.

Petitioner felt that these investigations were insulting and in effect impugned his integrity. But whether petitioner's feelings were correct or not, these are the actions of a judge personally embroiled with an attorney. The Court of Appeals erred in finding that Judge Jones was not embroiled in the light of Taylor.

III. THE CONTEMPT CONVICTION AND THE STATE COURT OF APPEAL OPINION HERE VIOLATE PETITIONER'S FIRST AND FOURTEENTH AMENDMENT RIGHTS, CHILL THE EXERCISE OF THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF ALL ATTORNEYS IN ALL CASES, AND PARTICULARLY THOSE OF DEFENSE COUNSEL IN CONTROVERSIAL CRIMINAL AND POLITICAL CASES, AND THUS IMPERMISSIBLY THREATEN THE INDEPENDENCE OF THE BAR, VIGOROUS ADVOCACY, AND THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF CRIMINAL DEFENDANTS AND OTHER LITIGANTS.

Guidelines are generally required as to minimal due process elements of

procedures to be afforded attorneys when charged with criminal contempt. Guidance from this Court is additionally needed in the special circumstances presented here when First Amendment rights are inextricably involved in the context out of which a contempt arises, and when the contempt is based upon interpretation of remarks. When the language of the attorney is deemed contemptuous through an interpretation of his remarks, there is a special need to protect First Amendment freedoms and not to impose self-censorship upon the attorney representing his client.

When remarks are contemptuous only through a subsequent judicial interpretation, and arise in a First Amendment context, there clearly must be a warning

to the attorney, in specific terms,both as to his tone or loudness of voice,and as to the nature of the subject matter which the court finds contumacious. An ambiguous warning which relates to a completely different facet of the attorney's behavior, i.e. the warning not to interrupt the district attorney, a warning completely silent as to tone of voice, cannot, Constitutionally, be construed as a warning on loudness of tone. Petitioner's conviction rests upon such a transmutation of a warning on one issue into a warning on tone.

A judgment of the court which concludes that the attorney went too far, made a mistake, or used inept language, or did not clothe an objection in

in phrases sufficiently softening, cannot be the basis for a criminal conviction, if an independent and vigorous bar is to be preserved.

Petitioner's language here, "Unless there is a different rule for him than for me", is very much less elegant than several alternative phrasings which would clearly not have been sustained as contemptuous, but may a criminal conviction be Constitutionally based upon such subtle distinctions, and may an attorney Constitutionally be required to take the risk that a judge will decide his remarks did constitute contempt?

The California Supreme Court has mostly recently expressed a concern on

a similar issue, in Siegel v.Committee of Bar Examiners, 10 Cal. 3rd 156(1973). There the Court ordered Siegel admitted to practice, overturning the recommendation of the Committee that he be denied admission to the bar. The Committee found that Siegel had lied, at hearings before it, concerning his intent when he made several speeches years before. The Committee recommended refusal of Siegel's application to practice law not on the basis of the speeches themselves, but on the basis of their finding that he lied when he told the Committee he had not intended to advocate violence in the speeches. The Supreme Court of California found the issue of Siegel's "credibility" to be close to

the sensitive area of First Amendment rights and the risk of imposing self-censorship on public speakers.

Citing New York Times v. Sullivan, 376 U.S. 254 (1964) and Speiser v. Randall, 357 U.S. 513 (1958) the Court examines their relevancy to a situation where after a speech is made, later interpretation is made having the effect of determining substantial rights, thus threatening the rights of free speech and tending to impose self-censorship. (See footnote at 10 C. 3d 175).

Though there may be occasions when attorneys exceed the limits of First Amendment protections, a criminal contempt conviction should never be affirmed when two or more reasonable interp-

retations of the utterances are possible, and only one supports a finding of contempt.

A long line of cases upholds the First Amendment in the area of indirect contempt and criticism of the courts. From Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1945); Craig v. Harney, 331 U.S. 367 (1946); Wood v. Georgia, 370 U.S. 384 (1962); Garrison v. Louisiana, 379 U.S. 64 (1964); Konigsberg v. State Bar of California, 353 U.S. 252 (1957), the thrust of this Court's decisions has been that,

> "...Because of the very nature of our democracy such expressions of political views must be permitted. Citizens have a right under our constitutional system to criticize governmental officials

> and agencies. Courts are not, and should not be immune to such criticism..." Konigsberg v. State Bar of California, supra, at 269.

To force petitioner, and other attorneys, to consider at their peril, as they argue an objection to the admissibility of evidence, or defend themselves if they feel that the trial court has impugned their integrity, whether one possible interpretation of their remarks may deem them contemptuous, is essentially to do that forbidden by NAACP v. Button, 37 U.S. 415 (1962): "...under the guise of prohibiting professional misconduct, ignore Constitutional rights..."

A contempt conviction based upon an interpretation of the intent and meaning of remarks which would not lead to a

finding of contempt, and where there is no disruption of the proceedings, impermissibly threatens First Amendment freedoms and imposes a self-censorship upon an attorney inconsistent with the duties of vigorous advocacy. Under such a test, petitioner's conviction here could not be Constitutionally sustained.

As cogently stated in a distinguished report:

> "...the bar as a whole [has] misconstrued, both publicly and in its private councils, the dimensions and causes of courtroom disorders. In speeches, reports, panels, judicial conferences, and other forums, the law professors acted... as if the courts of this country

had suddenly been taken over by an organized group of radical lawyers interested only in destroying the system that was protecting their clients. This panic did great and lasting damage to the public perception of the processes of the laws, for it exaggerated far out of proportion the problems that had occurred in a few court rooms...Further, it confused zeal in the defense of clients with revolution, and thus moved in the direction, with threats of disbarment, of intimidating defense counsel. [T he system] ...is more in danger from interference with counsel fighting for justice for their clients than from whatever disruption - and it is on the whole not very great - is caused by their efforts." (Burke Marshall, Chairman of the Special Committee on Courtroom Conduct, appointed by the Bar Association of New York in Disorder in the Courts, Pantheon Books, 1973, p. xiii-xiv.)

The present case well illustrates the effect of this "panic" on one individual, a prominent practitioner with over thirty five years of experience defending clients, including many unpopular ones, who has served a five day jail sentence, paid a $500.00 fine, litigated the Constitutional issues involved herein through the trial and appellate levels of the state and Federal courts, and now faces possible disbarment or lesser disciplinary sanction from the State Bar of California.

These consequences are based on an exchange with a trial judge during the course of a criminal trial of several American Indians charged with trespass. Most practitioners have no doubt experienced something akin to the situation

which developed during the colloquy here involved. The brief exchange can hardly be thought to have presented a threat to the fair administration of justice. The authors of the prestigious study Disorder in the Courts advocate totally abolishing the concept of summary punishment for direct contempt (at p. 264). This Court, citing the study in Taylor, drastically narrowed the circumstances under which summary punishment is permissible. Petitioner has yet to be accorded due process; and the entire bar of the State of California,[11] and elsewhere, yet suffers

11 The decision of the State District Court of Appeal, which affirmed petitioner's contempt conviction on two counts (In re Grossman, 24 C.A.3d 624 (1972), has been reported and discussed in Witkin, Procedure, 2d Ed. Section 152, leading reference text for California practitioners and judges.

under the chilling effect of pre-Taylor views on "direct contempt".

Petitioner, in vigorously, although maladroitly, attempting to see that his clients were not deprived of due process, has himself been denied that due process. Petitioner has suffered these penalties, and they are heavy ones,[12] because he, as would any other human being, whether judge, or lawyer, or litigant, defended his integrity when he thought it was under attack. It was this circumstance above all else which brought petitioner

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12 Petitioner still faces disciplinary action from the State Bar of California. After a hearing before a preliminary investigating committee, an order to show cause was issued based, inter alia, upon the alleged contempt before Judge Jones. A formal hearing has been had and the matter is now submitted for decision before a local administrative committee of the State Bar.

into the entire situation from whence his conviction and all of the appellate litigation flowed. This Court, in Taylor, vindicated the legal basis for petitioner's position when further protection was extended to the vigorous advocate, in line with the recommendation of the Committee authoring Disorder in the Courts, that our judicial system is:

> "...more in danger from interference with counsel fighting for justice for their clients than from whatever disruption...is caused by their efforts." (p. xiv).

The protections of Taylor should be extended to petitioner.

Thus it is respectfully submitted that petitioner's conviction cannot Constitutionally be sustained, and should be voided.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and orders of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Fay Stender
1714 Stockton Street
San Francisco, California
94133
(415) 433-6790

Attorney for Petitioner

December 16, 1974

APPENDIX A

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

RECEIVED

July 8, 1974

Ms. Fay Stender
Stender, Lapides, STender & Weinberg
Pier 37 at Beach St.
San Francisco, Calif. 94133

RE: GROSSMAN v. STRIEPEKE, ETC.,
73-787

Dear Ms. Stender:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Taylor v. Hayes, 418 U.S. (1974)

encl. = cc opin. in 73-473

cc: John Hawkes, Esq.
District Attorney of
County of Sonoma
2555 Mendocino Ave.
Santa Rosa, Calif. 95401

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

Rodney J. Blonien, Esq.
Deputy Attorney General of California
6000 State Bldg.
San Francisco, Calif. 94102

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

Filed Jul 11 1973

No. 72-2526

AUBREY GROSSMAN,
Plaintiff-Appellant,

vs.

DONALD STRIEPEKE, Sheriff of County of Sonoma, State of California,
Defendant-Appellee.

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Before: KOELSCH, BROWNING, and CARTER, Circuit Judges

Appellant was summarily convicted of direct contempt while serving as defense counsel in a criminal trial in a California municipal court. He was sentenced to five days' imprisonment and fined $500.

The contempt order was annulled in part and affirmed in part by the appropriate California District Court of Appeal, and remanded for reconsideration of the sentence. *In re Grossman*, 24 Cal. App. 3d 624, 101 Cal. Rptr. 176 (1972). The Supreme Court of California denied appellant's petition to review.

Appellant applied to the court below for a writ of habeas corpus. The petition was denied.

The facts are stated in the published opinion of the California District Court of Appeal. In this court appellant has raised three issues. Each was considered and rejected by the state appellate court. We likewise reject them for the rea-

sons stated in that court's opinion, with the following additional comments.

1. We agree with the California appellate court that the record does not indicate that the trial judge became so "personally embroiled" that due process required that the contempt charge be tried before another judge. *See Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

Appellant complains that in reaching this conclusion the state appellate court did not mention statements made by the trial judge to the effect that appellant had used various devices, "some not too ethical," to delay the trial. The remarks were made in connection with a request for a continuance of the trial of appellant's client. The date for the trial was reset five times. A year passed between the alleged criminal acts and the trial, and over nine months between the trial and the date originally set for trial. A substantial part of the delay was attributable to appellant's requests for continuances and his attempts to remove the state criminal proceedings to federal court. Despite the judge's remarks, further continuances were granted. Considering the record as a whole, we cannot say that the judge's isolated comments demonstrated a personal antipathy toward appellant.

2. Assuming, but not deciding, that *In re Hallinan*, 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (1969), states a requirement of due process under the Fourteenth Amendment, and that a conviction for contempt therefore may not be based upon an attorney's improper tone of voice without a prior warning by the court, we nonetheless reject appellant's contention that the *Hallinan* rule was violated. The California appellate court could properly find, as it did, that appellant was given an adequate warning. We also agree with the California court that under the *Hallinan* rule no

warning is required where the words used are in themselves clearly contemptuous, as they were in this instance. *See United States v. Schiffer*, 351 F.2d 91, 95 (6th Cir. 1965).

3. Finally, we conclude that the state appellate court could properly find, as it did, that appellant's conduct constituted an "imminent, not merely a likely, threat to the administration of justice." *In re Little*, 404 U.S. 553, 555 (1972). *See also United States v. Seale*, 461 F.2d 345, 369-71 (7th Cir. 1972); *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972). Appellant's remarks were of a disruptive nature both because of their conduct and because they were delivered, as the municipal court judge found, "in a loud, disorderly, contemptuous, insolent and rude manner and tone of voice." *See Fisher v. Pace*, 336 U.S. 155, 161 (1949). *Cf. United States v. Seale, supra*, 461 F.2d at 370. As the California court said, "Certainly, the argument of the Attorney General that the court's action in recessing the proceedings at that time was proof of an interruption of the court proceedings and his observation that petitioner so upset the judicial process that the judge failed to rule upon the objection in question is most persuasive on this point."

Appellant contends that the time at which the incident occurred and the court ordered the recess (3:55 p.m.) was shortly before the court proceedings *might* in any event have been recessed for the day. Assuming that relatively little trial time was lost that day, the trial continued for at least two days, and the disruptive conduct might well have been repeated if not immediately discouraged.

Affirmed.

APPENDIX C

APPENDIX C

United States Court of Appeals
for the Ninth Circuit

Filed Aug 17 1973

No. 72-2526

AUBREY GROSSMAN,
Plaintiff-Appellant,

vs.

DONALD STRIEPEKE, Sheriff of County of Sonoma, State of California,
Defendant-Appellee.

ORDER

Before: KOELSCH, BROWNING, and CARTER, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

In response to appellant's expression of concern, we wish to make it clear that our opinion is not to be read as in any way suggesting that appellant engaged in conduct that was "not too ethical."

The petition for rehearing in banc is denied.

Dated: August 17, 1973

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 8 1974

CLERK
U. S. COURT OF APPEALS

AUBREY GROSSMAN, Plaintiff-Appellant, v. DONALD STRIEPKE, Sheriff of County of Sonoma, State of California, Defendant-Appellee.	No. 72-2526 ORDER

Before: KOELSCH, BROWNING, and CARTER, Circuit Judges

Pursuant to the Supreme Court order of July 8, 1974, we have reconsidered this case in light of Taylor v. Hayes, ___ U.S. ___ (June 26, 1974). We adhere to our decision of July 11, 1973.

Taylor is relevant to only one of the issues raised before this court: whether the trial judge was so "personally embroiled" that due process required trial of the contempt charge before another judge. We have reviewed the record in light of Taylor, and do not find "'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" Taylor v. Hayes, supra, ___ U.S. at ___ (slip at 13), quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964).

The district court's order denying the petition for habeas corpus is affirmed.

APPENDIX E

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docketed

FILED

NOV 20 1974

U. S. COURT OF APPEALS CLERK

AUBREY GROSSMAN, Plaintiff-Appellant, v. DONALD STRIEPEKE, Sheriff of County of Sonoma, State of California, Defendant-Appellee.	)	No. 72-2526 ORDER

Before: KOELSCH, BROWNING, and CARTER, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc. On the original appeal appellant failed to raise the issue of whether the state trial court erred in refusing to grant a hearing prior to final judgment and sentencing on the contempt citation, and the error complainted of is not plain error.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX H

APPENDIX H

In re AUBREY GROSSMAN on Habeas Corpus.

Crim. No. 10453. First Dist., Div. Two.

March 31, 1972. (24 Cal. App. 3d 624.)

Opinion

Rouse, J.—Petitioner, an attorney, seeks annulment of an order of direct contempt issued by the Municipal Court of Sonoma County at the conclusion of a criminal trial of a member of defendants, some of whom were represented by petitioner. The order adjudged petitioner in contempt and

imposed a fine of $500 and a sentence of imprisonment for five days.

We summarily denied petitioner's application for a writ of habeas corpus on January 3, 1972. On January 24, 1972, while a new petition was pending in the California Supreme Court, the United States Supreme Court decided *In re Little*, a per curiam opinion reported in ..... U.S. ..... [30 L.Ed. 2d 708, 92 S.Ct. .....]. The *Little* case, along with *In re Hallinan* (1969) 71 Cal. 2d 1179, 1182, 1183 [81 Cal. Rptr. 1, 459 P.2d 255], was cited by the California Supreme Court in its order to show cause before our court why the relief prayed for should not be granted.

Mindful of a special reponsibility which rests heavily upon our shoulders when called upon to examine the conduct of representatives of the Bench and Bar, in a judicial proceeding, we believe that a preliminary discussion and review of some basic concepts is in order.

There are, we suggest, certain areas of the trial arena in which a reviewing court must tread most cautiously. One of these involves the utilization of the physical senses in seeing and hearing what one does or says in the courtroom. This becomes an even more sensitive area when dealing with a case of alleged contempt. The cold transcript imparts information of little value concerning the appearance, general conduct and demeanor of the alleged transgressor. In the United States Supreme Court case of *In re Little, supra,* ..... U.S. ....., Mr. Chief Justice Burger pointed out that the propriety of such a holding depends "in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealth with except on full ventilation of the facts. Those present often have a totally different

impression of the events from what would appear even in a faithful transcript of the record."

The efficacy of a proper exercise of the contempt power is directly related to the timeliness of the order which adjudges the contemnor. If the contempt proceeding is to be at all meaningful then it is imperative that inappropriate and offensive conduct be dealt with promptly at the time of the occurrence, so as to create, hopefully, a lasting impression of cause and effect.

On the other hand, it is equally important that the situation be dealt with in an atmosphere of calm and dispassion. Often the person most qualified to evaluate the severity of such conduct is a judge who is the subject of what may have been a personal and bitter attack. Thus is created the dilemma which has plagued reviewing courts for years. The United States Supreme Court recognized the problem in the case of *Sacher v. United States* (1951) 343 U.S. 1 [96 L.Ed. 717, 72 .Ct. 451]. "If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted." (P. 11 [96 L.Ed. at p. 724].)

It has been suggested that a judge contemplating a summary contempt order might do well to declare a recess and, in the serenity of his chambers, reflect whether the conduct in question is truly so aggravated as to constitute contempt or whether his reaction to it is simply one of judicial nerves on edge. Rule F. 3, subdivision (b), of the American Bar Association's recently adopted Standards Relating to The Judge's Role in Dealing with Trial Disruptions (Am. Bar Assn. Project on Standards for Criminal Justice, Tentative

Draft (May 1971)),[1] recommends that "The trial judge . . . consider the advisability of deferring adjudication of contempt for courtroom misconduct of a defendant, an attorney or a witness until after the trial, and . . . defer such a proceeding unless prompt punishment is imperative." (P. 19.)

Even more difficult in this field of direct contempt is the situation which confronts a judge when the conduct involves a lawyer's behavior in the course of trial. A reading of many appellate decisions dealing with this delicate subject discloses the existence of a very fuzzy area between the proper zeal of aggressive and effective advocacy and improper contumacy amounting to aggravated misconduct. So zealously have reviewing courts sought to preserve the right of the trial advocate's independence in pursuing his cause on behalf of a client that some attorneys have mistakenly concluded that rudeness and discourtesy in the juidicial proceeding are accepted methods to be employed by the successful practitioner. While recognizing that an attorney has the duty to protect the interests of his client, that he has the right to press legitimate argument and to protest an erroneous ruling, and that an attorney may assert that which he believes to be correct in a forthright manner, if he acted in the due course of a judicial proceeding, our Supreme Court went on to caution that "We do not mean to suggest . . . that it is impossible for an attorney to subject a judge to ridicule and insult by intonations and gestures accompanying words wholly innocuous, or that, in such event, the judge is powerless to protect the dignity of the court." (*Gallagher v. Municipal Court* (1948) 31 Cal. 2d 784, 796 [192 P.2d 905]; *In re Hallinan, supra,* 71 Cal. 2d at p. 1183.)

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1. All subsequent references to this publication are designated "ABA Standards."

Members of the bar have the right to expect and demand courteous treatment by judges and court attaches; similarly, the court has the right to expect and demand that, in the course of judicial proceedings, advocates will conduct themselves in a courteous, professional manner.

Section 6068 of the Business and Professions Code, in setting forth the obligations of an attorney in this state, provides, in part, that "It is the duty of an attorney: . . . (b) To maintain the respect due to the courts of justice and judicial officers. . . . (f) To abstain from all offensive personality . . ."

Subdivision 3 of section 1209, Code of Civil Procedure, describes the following as "contempts of the authority of the court: . . . 3. Misbehavior in office, or other wilful neglect or *violation of duty by an attorney, . . .*" (Italics ours.)

We note that Rule D.1 of the ABA Standards provides, in part, that "The trial judge should require attorneys to respect their obligations as officers of the court" (p. 13), and that Rule A.2 provides, in part, that "The trial judge has the obligation to use his judicial power to prevent distractions from and disruptions of the trial" (p. 5).

In passing, we conclude that incidents involving unprofessional conduct on the part of some advocates in recent criminal trials have not gone unnoticed by our Chief Justice, Warren Burger, who, during an address given at the 1971 American Bar Association Convention, remarked that "To discharge properly the heavy responsibiilties placed on the contending advocates in criminal cases, it is essential that they should possess sound legal education, basic training and skill in advocacy and *substantial instruction in professional behavior, and that they be aware of penalties for departures from professional norms. . . .* Observance of proper standards aids rather than hinders the accused because it

provides him with an advocate who is trusted by the other key participants and yet does not in the slightest impede courageous, zealous and skillful advocacy." (Chief Justice Warren Burger, July 16, 1971, 94th Annual Meeting, Am. Bar Assn.; italics added).

Summarizing the recitations in the order, it appears that petitioner was found in contempt for three instances of misconduct: (1) after having been admonished by the court to refrain, petitioner continued to argue after an objection by the prosecution had been sustained; (2) petitioner accused the court of favoring the prosecution in rulings on the admissibility of evidence; and (3) petitioner falsely accused the court of calling him (petitioner) a liar. The order recites that statements on which the second and third instances of misconduct were based were made in a "loud, disorderly, contemptuous, insolent and rude manner and tone of voice...."

Language used by the trial court in its order follows that of Code of Civil Procedure, section 1209, which reads as follows: "The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: 1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding."

The conduct found contemptuous occurred in the immediate view and presence of the court during a jury tial in which petitioner was counsel for a number of defendants.

The power of the court to punish summarily for a direct contempt is contained in Code of Civil Procedure, section 1211, which provides: "When a contempt is committed in the immediate view and presence of the court, . . . it may be punished summarily; for which an order must be made,

reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed." (Italics added.)

"[A]ll that is required is that an order be made reciting the facts constituting the contempt, adjudging the person guilty, and prescribing the punishment." (*In re Karpf* (1970) 10 Cal. App. 3d 355, 364 [88 Cal. Rptr. 895]; *In re Hallinan, supra,* 71 Cal. 2d at p. 1180.)

The order, which recites facts pertinent to acts committed in the immediate view and presence of the court during the course of a trial, establishes the jurisdiction of the court to issue the order. Jurisdiction having been established, our responsibility on review of a contempt order "is merely to ascertain whether there was sufficient evidence before the trial court to sustain its judgment and order." (*Arthur v. Superior Court* (1965) 62 Cal. 2d 404, 409 [42 Cal. Rptr. 441, 398 P.2d 777].) The power to weigh the evidence rests with the trial court. (*Bridges v. Superior Court* (1939) 14 Cal. 2d 464, 485 [94 P.2d 983] (reversed on other grounds, *Bridges v. California* (1941) 314 U.S. 252 [86 L.Ed. 192, 62 S.Ct. 190, 159 A.L.R. 1346]).)

(1a) *Was the trial judge so "personally embroiled" with petitioner as to make the judge unfit to sit in judgment on the contempt charge?*

(2) Although Code of Civil Procedure, section 1211, permits summary punishment for direct contempt, the term "summary" refers to the character of the contempt proceeding, not its timing, does not demand instant punishment, and the practice of deferring the contempt adjudication of an attorney and the imposition of punishment until the end of the trial has been uniformly approved. (*People v. Fusaro*

(1971) 18 Cal. App. 3d 877, 888-889 [96 Cal. Rptr. 368];[2] *Sacher v. United States, supra,* 343 U.S. at pp. 9-10[96 L.Ed. at pp. 723-724]; *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 [27 L.Ed. 2d 532, 91 S.Ct. 499];[3] Rule F.3, subdivision (b), ABA Standards, *supra,* p. 19.)

(1b) However, in *Mayberry v. Pennsylvania, supra,* the principle emerged that a judge may become so "personally embroiled" with a lawyer in the trial as to make him unfit to sit in judgment on the contempt charge. (P. 465 [27 L.Ed. 2d at p. 540].) Rule F.5 of the ABA Standards suggests that "The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge if his conduct was so integrated with the contempt that he contributed to it or was otherwise involved, or his objectivity can reasonably be questioned." (P. 21.)

In the instant case, although petitioner was held in contempt on November 19, 1971, the order adjudging petitioner in contempt and imposing his sentence was not issued until November 23, 1971, after the jury had returned its verdict and had been excused.

Petitioner contends that the judge in the instant case was "personally embroiled," within the meaning of the Mayberry case, and that he was therefore entitled to have his

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2. In *People v. Fusaro, supra,* which the court noted was the first reported instance where a California judge saw fit to imprison an accused person's defense lawyer in midtrial (p. 888), the court concluded that "Unless demanded by overwhelming circumstances, the court-imposed delay caused by jailing the defense lawyer in midtrial is inherently wrong, damaging to the defendant's right to a speedy trial and antithetical to the public interest in speedy, economical justice." (P. 890.)

3. In *Groppi v. Leslie* (1972) ..... U.S. ..... [30 L.Ed. 2d 632, 92 S.Ct. .....], however, the court reversed a contempt order issued by a *legislative body* two days after the event, in the absence of the contemner, a layman, and without notice to him.

contempt hearing before a different judge. A similar contention was made in *Weiss v. Burr* (1971) 327 F. Supp. 1306, 1309, where the court disposed of the argument as follows: "Petitioner relies on *Mayberry* to support his contention that due process was violated in that he was denied an unbiased judge. His reliance is misplaced. *Mayberry* holds that a judge who has been addressed with 'fighting words' such as 'dirty tyrannical old dog' and 'dirty sonofabitch' should not give himself the opportunity to give vent to personal spleen in a judgment of contempt at the end of a trial. *Mayberry* distinguished the kind of case at issue here: 'It is of course not every attack on a judge that disqualifies him from sitting. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921,[4] we ruled that a lawyer's challenge, though "disruptive, recalcitrant, and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." ' 91 S.Ct. at 505."

We observe that the judge in *Ungar v. Sarafite, supra,* 376 U.S. 575, was much more "personally embroiled" with the offending attorney (see colloquy on p. 585, fn. 7 [11 L.Ed. 2d at p. 929]). Also, the words used by petitioner in the instant case were not "fighting words" of the character employed in Mayberry. We conclude that the judge was not unfit to sit in judgment on the contempt charge and petitioner was not entitled to a hearing before another judge. (*Ungar v. Sarafite, supra,* p. 584 [11 L.Ed. 2d at p. 928]; *Mayberry v. Pennsylvania, supra,* 400 U.S. at pp. 465-466

4. The words used by the lawyer in the *Ungar* case, while he was on the witness stand, were as follows: "I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 580 [11 L.Ed. 2d 921, 926, 84 S.Ct. 841]; see also p. 584.)

[27 L.Ed. 2d at pp. 540-541]; *Weiss v. Burr, supra,* 327 F. Supp. at p. 1309.)[5]

(3) *Is the order adjudging petitioner in contempt void in that it does not sufficiently recite the facts constituting contempt as required by Code of Civil Procedure, section 1211?*

Petitioner argues that the order, as worded, does not meet the test set forth in *In re Hallinan, supra,* 71 Cal. 2d 1179, that "An order adjudging a person in direct contempt of court must recite *in detail* the facts constituting the alleged transgression *rather than the bare conclusions of the trial judge.*" (Italics added.)

The wording upon which petitioner relies appears in *In re Hallinan, supra,* at p. 1182. It is, however, a quote from the earlier *Gallagher v. Municipal Court* opinion (*supra,* 31 Cal. 2d at p. 795). Code of Civil Procedure, section 1211, does not contain the words "in detail," and our conclusion is that although it may be better practice for the trial court to set forth the exact words used, we do not believe it is mandatory that that court do so. The order, as worded, states the facts "with sufficient particularity to show, without the aid of speculation, that a contempt actually occurred." (*Chula v. Superior Court* (1962) 57 Cal. 2d 199, 203 [18 Cal. Rptr. 507, 368 P.2d 107, 97 A.L.R. 2d 421].)

(4) "Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily. All that is required is that an order be

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5. In *In re Little, supra,* ..... U.S. ....., following the contempt adjudication, the defendant called the judge a "M..... F....." Mr. Chief Justice Burger and Mr. Justice Rehnquist, in a concurring opinion, suggested that Little be summoned before the court and *observing the strictures of Mayberry . . .*" show cause why he should not be held in contempt for the conduct and utterances *following* the contempt adjudication (italics added). We know, at least, that the use of these words will constitute a contempt and also entitle the contemner to a hearing before another judge.

made *reciting the facts,* adjudging the person guilty, and prescribing the punishment." (*In re Hallinan, supra,* 71 Cal. 2d at p. 1180; italics added.)

We shall hereafter examine the record with respect to each instance of conduct found to be contemptuous to see if the evidence supports the finding of contempt in light of the cases cited to us by the California Supreme Court.

Does the evidence show that a contempt was committed as to:

(a) *The first instance of conduct found to be contemptuous?*

(5a) The first instance of conduct found to be contemptuous arose out of an exchange that took place on redirect examination, when the prosecutor objected to a question put to a witness by the petitioner. The order adjudging petitioner in contempt sets forth these preliminary facts and then recites the first instance of conduct found to be contemptuous as follows: "After having been repeatedly instructed and admonished by the Court to refrain from such activity and comment, [petitioner] continued to argue after the above-mentioned ruling of the Court [that the objection was sustained] had been made and announced."

We have examined the record and find that no ruling on the objection was ever made.[6] Thus, the evidence does not support the finding that petitioner "continued to argue after the above-mentioned ruling . . . had been made and announced." In addition, the record shows that after petitioner had been admonished, he asked permission to reply to the stated objection.

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6. The Attorney General concedes that "the record does not disclose that a ruling was ever made on his objection . . ." He then goes on to say that "petitioner so upset the judicial process, that [the judge] did not rule on the objection in question."

(6) "An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling.[7] . . . [A]n attorney may assert that which he believes to be correct in a forthright manner, if he is acting in the due course of a judicial proceeding. [Citation.]" (*Gallagher v. Municipal Court, supra,* 31 Cal. 2d at p. 796; *In re Hallinan, supra,* 71 Cal. 2d at p. 1183.)

(5b) We conclude that the evidence does not support the order with respect to the first instance of conduct found to be contemptuous.

(b) *The second instance of conduct found to be contemptuous?*

(7) The second instance of conduct found to be contemptuous is stated in the order as follows: "In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, accused the Court of exercising different standards of judgment in favor of the prosecution and against the defense in determining the admissibility of proffered evidence."

The offending words were: "unless there's a different rule for him than for me."[8]

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7. Evidence Code, section 774, provides: "A witness once examined cannot be reexamined as to the same matter without leave of the court, *but he may be reexamined as to any new matter upon which he has been examined by another party to the action.* Leave may be granted or withheld in the court's discretion." (Italics added.) Although no ruling on the objection was made, we do know that the court *intended* to sustain the objection, for the order adjudging petitioner in contempt stated that the court did *in fact* sustain the objection.

8. "Mr. Grossman: The question that he asked was, 'So you go around the country occupying.' All right. Doesn't he open the question of whether he does go around the country occupying? So I want to ask him about a place that he did occupy. The Court: What has that to do with the issues in this case? Mr. Grossman: Well, then, why did he ask it? I've said it before: If he's willing to open

In *In re Little, supra,* ..... U.S. ....., cited to us by the California Supreme Court in the order to show cause, a defendant arguing his own case made statements in summation that the court was biased and prejudiced the case and that he was a political prisoner. The North Carolina court, on the basis of a statute similar to our Code of Civil Procedure, section 1209,[9] adjudged him in contempt for these statements, wording its order as follows: " 'The Court concludes on the foregoing facts that the conduct of the [petitioner] and the words spoken by him in the presence of the Court were contemptuous, that they reflected on the integrity of the Court and tended to subvert and prevent justice.' "

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up an irrelevant field, then I'm entitled to redirect or on cross to go into the same field, unless there's a different rule for him than for me. The Court: Mr. Grossman, you know better than that. Mr. Grossman: I don't know better than that. So don't say I know better than that. The Court: Mr. Grossman— Mr. Grossman: I say what I believe. Don't say I know better than that. You're saying I'm a liar. I'm not a liar, Judge. Don't say I know better than that. The Court: I cite that as misconduct, Mr. Grossman. Mr. Grossman: What? That I said you call me a liar? The Court: Is misconduct. Your whole line of conduct, Mr. Grossman. I think at this time it might be a good place to take our afternoon recess. I think counsel and the Court will have some conversation to engage in which should more properly be done outside the presence of the ladies and gentlemen of the jury. Now, we'll take our recess at this time until 10:00 o'clock on Monday morning. Once again, while we're disbanded, once again let me remind you of my admonition about discussing the case or forming or expressing any opinions. I expect counsel to remain."

9. The statute involved in the *Little* case differed from ours in this respect: The wording of our Code of Civil Procedure, section 1209, is *tending* to interrupt the due course of a trial," (italics added), whereas section 5-1(1) of the North Carolina statutes, makes punishable for contempt " 'Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and *directly tending to interrupt its proceedings*, or to impair the respect due to its authority.' " (*In re Little, supra;* (italics added).)

The United States Supreme Court reversed the judgment. Its holding was as follows: "We hold that in the context of this case petitioner's statements in summation did not constitute criminal contempt. The court's denial of the continuance forced petitioner to argue his own cause. He was therefore clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause. *In re McConnell*, 370 U.S. 230 (1962). *There is no indication, and the State does not argue, that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding.* Therefore, "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.' *Craig v. Harney*, 381 U.S. 367, 376 (1947). 'Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.' *Brown v. United States*, 356 U.S. 148, 153 (1958).

"The reversal of this conviction is necessarily required under our holding in *Holt v. Virginia*, 381 U.S. 131 (1965). There attorneys filed motions that the trial court recuse himself and for a change of venue, alleging that the judge was biased. The motion for change of venue alleged that the judge intimated and harassed the attorneys' client. The court adjudged the attorneys in contempt for filing these motions. We reversed for reasons also applicable here:

" 'It is not charged that petitioners here disobeyed any valid court order, *talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties.* Their convictions rests on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holliday because of alleged bias on his part.' *Id.*, 136." (*In re Little, supra,* ..... U.S. .....; (italics added.)

Because of the obvious significance of the *Little* opinion, we have also examined the cases cited in *Little* upon which the court relied in arriving at its conclusion:

(1) *In re McConnell* (1962) 370 U.S. 230, 236 [8 L.Ed. 2d 434, 438, 82 S.Ct. 1288]. The court held that "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer *does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.*"[10] (Italics added.)

(2) In *Holt v. Virginia* (1965) 381 U.S. 131 [14 L.Ed.2d 290, 85 S.Ct. 1375], the principal case upon which the Little court relied, attorney Dawley, when ordered to show cause why he should not be held in contempt for refusing to answer questions, filed a motion to disqualify the judge, which was denied. He then filed a motion for change of venue, and attorney Holt, representing him on the motion, *read* to the court the motion as part of his argument urging a change of venue. The motion charged the court with "in effect and/

10. 18 U.S.C.A. section 401, the statute under which McConnell was convicted, provides that the court shall have power to punish such contempt of its authority as "Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . ."

or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge." (P. 133 [14 L.Ed.2d at p. 292].) The Virginia Supreme Court of Appeals affirmed a judgment of contempt against both lawyers, holding that the language used in the motion violated Virginia Code Annotated, section 18.1-292 (1960 Repl. Vol.), which authorizes summary punishment of a person who misbehaves in the presence of the court so as to obstruct justice, or who uses "'[v]ile, contemptuous or insulting language" to or about a judge in respect of his official acts (p. 135 [14 L.Ed.2d at p. 293]). The United States Supreme Court reversed, stating that "neither Dawley nor his counsel could consistently with due process be convicted for contempt for filing these motions unless it might be thought that there is something about the language used which would justify the conviction.

"As previously stated, *the words used in the motions were plain English, in no way offensive in themselves, and wholly appropriate to charge ... bias of the presiding judge.*" (*Holt v. Virginia, supra,* pp. 136-137 [14 L.Ed.2d at p. 294]; (italics added.)

Thus, under the Little case, a charge of bias (which we have here) made in plain English ("unless there's a different rule for him than for me") cannot be the basis of a contempt charge unless it (a) was uttered in a loud and boisterous tone, or (b) actually disrupted the court proceedings. (*In re Little, supra,* ..... U.S. .....)

The order states that "said act and words were grossly contemptuous of the orderly process and dignity of the Court, and tended to and did, interrupt the due course of

trial.'"[11] It is apparent from the record in this case that petitioner did not heed the court's admonition but chose instead to persist in a course of conduct which did disrupt the judicial proceedings to the extent that the judge found it necessary to recess the trial and hold a further hearing with petitioner concerning his conduct. Immediately after the occurrence of the third instance of conduct found to be contemptuous, the trial was recessed for the day at 3:50 p.m. and counsel were directed to remain, at which time the judge and petitioner had further discussion regarding the conduct in question. It was after this discussion that the judge announced his decision to hold petitioner in contempt and to take the matter up at conclusion of the trial. Certainly, the argument of the Attorney General that the court's action in recessing the proceedings at that time was proof of an interruption of the court proceedings and his observation that petitioner so upset the judicial process that the judge failed to rule upon the objection in question is most persuasive on this point.

The order *does* recite that the statement constituting the second instance of conduct found to be contemptuous was made in a "loud, disorderly, contemptuous, insolent and rude manner and tone of voice," meeting the first requirement of *Little*. California law requires a warning in in-

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11. In *Little*, the United States Supreme Court noted that the District Court's conclusion that the statements " 'reflected on the integrity of the Court and tended to subvert and prevent justice' " amounted to a finding by the District Court that the words were wilful and intentionally used and that the words used " '*tended to interrupt the Court's proceedings* and to impair the respect due its authority.' " It then noted that the state did not argue and there was no indication that the statements "in any wise *acually disrupted the court proceeding.*" (Italics added.)

stances of contempt based on tone of voice or manner.[12] The record here shows that the court had warned petitioner about continuing to interrupt *"in such a fashion"* when an objection was being stated.[13] (Italics added.) Although the text of that admonition does not make precise reference to a "loud" or "boisterous" tone of voice, it certainly refers to counsel's disorderly *manner.*

We conclude that the trial court's order adjudging petitioner in contempt as to the second instance complies with the requirements of *Little* and *Hallinan,* and accordingly must be upheld.

(c) *The third instance of conduct found to be contemptuous?*

(8a) The third instance of conduct found to be contemptuous is stated in the order as follows: "In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, falsely accused the Court of calling him a liar."

The record shows the offending words to be: "The Court: Mr. Grossman, you know better than that. Mr. Grossman: I don't know better than that. So don't say I know better than that. The Court: Mr. Grossman— Mr. Grossman: I say what I believe. Don't say I know better than that. *You're saying I'm a liar.* I'm not a liar, Judge. Don't say I know better than that." (Italics added.)

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12. *In re Hallinan, supra,* 71 Cal. 2d at page 1185; *Gallagher v. Municipal Court, supra,* 31 Cal. 2d at pages 796-797.

13. "The Court: Not when an *objection is being stated,* Mr. Grossman. You know better than that. *If you continue to interrupt in such a fashion,* not only will your record be so fouled up that it will never be undone, but I will take more firm steps to see that it doesn't recur. I think I make myself clear, do I not? Mr. Grossman: I suppose so." (Italics added.)

Note: Webster defines "fashion" as being synonymous with the word "manner." (Webster's Seventh New Collegiate Dictionary (1971).)

(9) A judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity. (*In re Friday* (1934) 138 Cal. App. 660, 663 [32 P.2d 1117].) "That counsel may have proceeded out of an excess of zeal . . . does not justify making scandalous charges against the judge." (Mosk, J., *Direct Contempt* (1956) 31 State Bar J. 510, 517.)

(8b) It is noted that the court in the instant case did not rest the third instance of misconduct on the false accusation alone. The order states that the false accusation was made "In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice . . ."

Our interpretation of *Hallinan* is that a warning is required "When the contempt order is based on statements of an attorney made in open court *the language of which is in itself not insolent, contemptuous or disorderly. . . .*" (*In re Hallinan, supra,* 71 Cal. 2d at p. 1181; italics added.) We must then determine whether the language used in the instant case meets that test.

We conclude that the record *does not* support the accusation made against the judge in this instance and that such accusation was rude and insolent; further, that the language, when considered in context with the balance of counsel's statement,[14] was on its face contemptuous and thus no warning was required.

The record here discloses that the attorney who was the subject of this order has been in practice for 35 years. We can readily distinguish a situation which involves a trial practitioner with that amount of experience from that of a lay person appearing in propria persona or one who has had

14. "Mr. Grossman: I say what I believe. Don't say I know better than that. *You're saying I'm a liar.* I'm not a liar, Judge. Don't say I know better than that.' (Italics added.)

little experience as a lawyer. Surely, counsel well knew that there were many ways with which to deal with a troublesome ruling other than by a personal assault upon the judge. Certainly the rebuking and untruthful accusation that "You're saying I'm a liar" could only have the effect of demeaning the entire judicial process in the eyes of the jurors and others there present.

The order is annulled with respect to the first instance, and affirmed as to the second and third sentences, of conduct found to be contemptuous. The matter is remanded to the municipal court for reconsideration of the punishment in light of this decision.

Taylor, P. J., concurred.

Kane, J.—I concur with that portion of the majority opinion which sustains the charges in paragraphs 2 and 3 of the order of contempt. I respectfully disagree, however, with the conclusion of my distinguished brethren that the charges in paragraph 1 have not been sustained.

It seems to me that some fundamental principles must be recognized at the very outset of the consideration of this case. First of all, we are dealing with the conduct of an attorney vis-a-vis the conduct of a trial judge during the course of a trial *in the presence of a jury composed of laymen.* On its face this is a setting which should never be subjected to the trauma that inevitably flows from a verbal conflict between counsel and court. That such should not occur is particularly true in California, where more than ample means and procedures are provided to parties and attorneys to avoid embarking on any potential collision course with a particular judge. For example, a trial judge may be disqualified peremptorily (Code Civ. Proc., § 170.6) or upon a showing of prejudice (Code Civ. Proc., § 170).

Once the trial begins, however, every lawyer should be conclusively presumed to know that it is totally improper fo rhim to argue with a judge or to dispute a judge's ruling *in front of the jury.*

Once again, very simple avenues are made available to trial counsel to accomplish the *bona fide* pursuit of any disagreement with the trial judge and/or his rulings. For example, counsel can request an immediate recess or wait for the next normal recess and have the matter heard out of the presence of the jury.

This, of course, assumes that the potential or actual collision course comes about by reason of good faith advocacy by counsel who is seeking to fully protect his client's best interests.

However, as Mr. Justice Rouse correctly points out, a "very fuzzy area" between proper advocacy and contempt has been created by appellate decisions which have led some attorneys to conclude "that rudeness and discourtesy in the judicial proceeding are accepted methods to be employed by the successful practitioner." In my view there simply is no room for the existence of any "fuzzy area" when dealing with this fundamentally simple problem.

With the readily available avenues suggested above I cannot find any justification for any lawyer—let alone a lawyer such as petitioner who possesses 35 years' experience—precipitating a dialogue with the court in the presence of the jury which is contemptuous, either in content or demeanor or both. The sole and exclusive responsibility for this must rest upon the lawyer for it is he, and only he, who possesses the power to prevent its occurrence.

Certainly any judge who has set on the trial court appreciates the awesome potential of the contempt power. It is a matter of common judicial knowledge that this power is

exercised very rarely indeed with respect to conduct of lawyers. Any competent judge—and the record here discloses obvious competency on the part of the trial judge—is keenly aware of and able to distinguish between zeal of advocacy and disrespect, i.e., contempt of court. If a judge is unable, or refuses, to make that distinction there are remedies available running all the way from peremptory challenge and appellate reversal to disciplinary action through the Commission on Judicial Qualifications.

The plain fact of the matter is embodied in the age-old American concept that this is, and must remain, a government of laws and not men. The judge is simply an entity placed by government in a position which carries great responsibility and is accordingly entitled to great respect by counsel who are licensed by that same government to practice their profession before the court.

As the majority opinion points out, the American Bar Association has promulgated a compedium of rules or guidelines with respect to conduct of trials. Other interested and distinguished groups have undertaken similar action (see Report and Recommendations On Disruption of The Judicial Process, American College of Trial Lawyers (July 1970)). Articles dealing with the same subject have reached voluminous proportions. All of this effort is academically healthy; but the problem is not nearly as complex as suggested by these observers. On the contrary, in my view, the problem is so fundamentally simple that it should be likened to the forest obscured by the trees.

The entire problem of direct contempt—verbal or conduct—by a lawyer is simply a matter of overtly refusing to accede *temporarily* to duly constituted authority. The case at bench presents a classic example.

I. *Contempt Incident No. 1.*

During redirect examination of a defendant the prosecutor objected and the following colloquy took place:

"Mr. Grossman: Q. You mentioned Toyon as a surplus government property. Did you actually participate and occupy in Toyon? A. This— Mr. Gallagher: Your Honor, I'm objecting. I don't know as it's material for us to go through a litany of— Mr. Grossman: You want to know about his activities. You are perfectly willing to ask him whether his activities was going around occupying—just one moment, please. The Court: Just, a moment, please, Mr. Grossman. Let Mr. Gallagher finish first. Mr. Grossman: I started first. So I'm entitled to finish. Isn't that the rule in this court? If I start, I'm entitled to finish. The Court: Not when an objection is being stated, Mr. Grossman. You know better than that. If you continue to interrupt in such a fashion, not only will your record be so fouled up that it will never be undone, but I will take more firm steps to see that it doesn't recur. I think I make myself clear, do I not? Mr. Grossman: I suppose so. The Court: Now, state your objection. Mr. Gallagher: I object to this as going into matters that are immaterial. My question that I asked earlier merely called for a 'yes' or 'no' matter, not a detailed report as to his activities in other regards. This courtroom is—I don't feel that the courtoom is the proper forum for Mr. Hernandez to state his beliefs in regards to what's happened to the Indians in the past. If Mr. Grossman would like him to be able to make a speech, he can find some other place to do it. Mr. Grossman: Very snide kind of legal objection. But now may I reply to it? The Court: You may. Mr. Grossman: The question that he asked was, 'So you go around the country occupying.' All right. Doesn't he open the question of whether he does go around the country occupying? So I want to ask

him about a place that he did occupy. The Court: What has that to do with the issues in this case? Mr. Grossman: Well, then, why did he ask it? I've said it before: If he's willing to open up an irrelevant field, then I'm entitled to redirect or on cross to go into the same field, unless there's a different rule for him than for me. The Court: Mr. Grossman, you know better than that. Mr. Grossman: I don't know better than that. So don't say I know better than that. The Court: Mr. Grossman— Mr. Grossman: I say what I believe. Don't say I know better than that. You're saying I'm a liar. I'm not a liar, Judge. Don't say I know better than that. The Court: I cite that as misconduct, Mr. Grossman. Mr. Grossman: What? That I said you call me a liar? The Court: Is misconduct. Your whole line of conduct, Mr. Grossman. I think at this time it might be a good place to take our afternoon recess. I think counsel and the Court will have some conversation to engage in which should more properly be done outside the presence of the ladies and gentlemen of the jury. Now, we'll take our recess at this time until 10:00 o'clock on Monday morning. Once again, while we're disbanded, once again let me remind you of my admonition about discussing the case or forming or expressing any opinions. I expect counsel to remain."

The order of contempt as to this incident reads: "After having been repeatedly instructed and admonished by the Court to refrain from such activity and comment, [petitioner] continued to argue after the above-mentioned ruling of the Court [that the objection was sustained] had been made and announced."

In holding that the evidence does not support the finding that petitioner 'continued to argue after the above-mentioned ruling of the Court had been made and announced" the majority, I respectfully submit, takes an unnecessarily

technical and microscopic position with respect to the fact that the court did not, in effect, say "Objection sustained."

Although a categorical ruling on the prosecutor's objection was not made by the court, the only rationally reasonable inference to be drawn from the colloquy is that the objection was, in fact, being sustained by the court. The record shows that both the judge *and petitioner* understood that the ruling had been made implicitly if not expressly.[1]

In sustaining the objection the court was clearly acting within its discretion in limiting or prohibiting the attempted line of inquiry. Evidence Code, section 774, which is quoted in the majority opinion, is a codification of the common law rule granting extremely broad discretion to the trial judge in allowing or restricting the scope of redirect examination. Thus, once the court made its position clar, which it did, counsel should have pressed his argument outside the jury's presence as suggested above.[2] Nothing in *In re Hallinan*

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1. That the judge thought he had sustained the objection is demonstrated in the order of contempt itself, viz.: "after the above-mentioned ruling of the Court had been made and announced."

Petitioner's clear understanding is demonstrated by his own statement made immediately following the episode after the court had excused the jury for the day: "[Mr. Grossman:] But what I was trying to do was to get you to change *your ruling on this point*, because *I felt the ruling on this point* proved conclusively this question of whether there is a discriminatory way . . . Well, *your ruling started it; your ruling started it.* You can't forget how it started." (Italics added.)

2. It is manifestly clear that petitioner knew that the proper way to pursue his argument was out of the jury's presence for the record, a portion of which is quoted in footnote 1, *ante*, shows that petitioner did press his argument forcefully. Many of petitioner's comments during this argument are themselves disrespectful and display an offensive personality per se. For example: "The Court: The record should note that the ladies and gentlemen of the jury have now cleared the courtroom.

"Mr. Grossman, I've cited you for misconduct and taken exception to your remarks and the charges, both implied and explicit, that the Court has different rules for the prosecution than the de-

(1969) 71 Cal.2d 1179 [81 Cal.Rptr. 1, 459 P.2d 255] suggests to me that the "'right to press *legitimate* argument and to protest an erroneous ruling'" is an invitation to engage in an argument with the judge *before the jury.* On the contrary, the *Hallinan* court, at page 1183, approved its earlier statement in *Gallagher v. Municipal Court* (1948) 31 Cal.2d 784 [192 P.2d 905]: "'We do not mean to suggest by anything said herein, that it is impossible for an attorney to subject a judge to ridicule and insult by intonations and gestures accompanying words wholly innocuous, or that, in such event, the judge is powerless to protect the dignity of the court.'"[3]

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fense, and the accusation of judicial misconduct. Now, I would expect, first of all, an apology. Is one forthcoming? Mr. Grossman: Well, I would suggest you have the record read back. You did not cite me for misconduct for that. You cited me for misconduct because I said that you were calling me a liar, and I's no liar. And I suggest, before you engage in ruling on whether I've committed contempt, *you better be sure that the record, which you're going to have to depend on, says that.* Now, I say you cited me for misconduct for that. *And you've realized since then how off base you were,* because the remark you made to me, if I may finish, the remark you made to me was not that 'you ought to know better,' but 'you should know better.' *And I'm smart enough to know you're calling me a liar before the jury.* You're saying, 'You know better,' and I said to you, 'I don't know better and you don't call me a liar.' Now, I've got some rights. And you're prejudicing this jury against me. The Court: I take it that that is not the form of an apology. Mr. Grossman: *What do you want an apology for?* The Court: Well, then, I need— Mr. Grossman: *I say, what do you want an apology for, what statement?*" (Italics added)

3. Of coincidental interest is the earlier case of *Hallinan v. Superior Court* (1925) 74 Cal. App. 420 [240 P. 788], which deals with the precise question of the extent of the attorney's right to argue a matter before the court. In upholding an order of contempt against the attorney for continuing to protest the court's ruling on an objection, the court made the following observations which are as sound today as they were 46 years ago: "*This right to argue a matter before the court, however, is not unlimited.* It must be exercised under the direction of the court and within such limits as may be prescribed by the court in the exercise of its discretion to regu-

If this is a "fuzzy area," it should be eliminated so that the trial of contested cases, especially jury cases, can be conducted in an atmosphere of dignity and respect.[4] Here, the aggravated conduct of petitioner is amply demonstrated by his refusal to heed the judge's instructions and admonition.

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late such matters. Otherwise, an attorney might delay and impede the trial of a case far beyond any legitimate limits. Argument of counsel, upon questions arising during the progress of a trial, is addressed solely to the court and its object and purpose is to enable the court to have the benefit of the views of counsel upon the questions under discussion in order that the court may be better advised upon such questions before it is called upon to decide them. *The court, rather than the attorneys in the case, must be the judge as to the extent and scope of such argument.* This must necessarily be for two reasons. In the first place, the court is primarily responsible for the prompt and orderly dispatch of business pending before it. *To permit attorneys in all cases to decide how often and how long they will argue questions arising during the trial, would mean that the direction and control or litigation would be taken from the court and transferred to counsel* in the case, and would often result in the unwarranted consumption of the time of the court to the great detriment not only of the parties to the pending litigation, but also of those whose actions are awaiting trial. In the second place, as the argument of counsel is directed to the court alone, the court is in far better position than counsel to decide when it is sufficiently informed as to the subject under consideration. When the court reaches the point that it feels that it is fully advised as to the question under discussion and ready to rule upon the same, and, therefore, requires no further enlightenment from counsel, *it is surely clothed with adequate power and authority to order the argument at an end, and, when necessary, in order to enforce its order, to punish the attorney guilty of its infraction. Under such circumstances, the action of counsel, in persisting in arguing a matter to the court, after the court has repeatedly ordered him to desist, amounts to disorderly behavior toward the judge of the court, which directly tends to interrupt the due course of the trial and is also disobedience of the lawful order of the court. Such acts are defined as contempt by the provisions of section 1209 of the Code of Civil Procedure.*" (Pp. 425-426; italics added.)

4. This is not a novel proposition at all. It was recognized and imprinted upon the law of this state in 1930 in the case of *In re Grossman*, 109 Cal. App. 625, where the court clearly points out that zeal of advocacy must yield to the dignity and authority of the

II. *Contempt Incident No. 2.*

In addition to the reasons advanced by the majority for upholding the order of contempt as to this incident, I believe further comment is appropriate.

The order of contempt as to this incident reads: "In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, accused the Court of exercising different standards of judgement in favor of the prosecution and against the defense in determining the admissibility of proffered evidence."

As pointed out in the majority opinion, the offending words of petitioner were "unless there's a different rule for him [the prosecutor] than for me." The majority opinion presents an excellent analysis of *In re Little* (1972) ..... U.S. ..... and its foundation cases. There are, however, two fundamental differences between the situation in *Little* and the case at bench. These differences, in my view, are of such significance that *In re Little* is, upon analysis, not germane to our inquiry.

The first significant difference is that *Little* does not

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court: " '*Attorneys at the bar are properly termed the "court's constituency", to aid it in the due administration of justice. Each one is required to take an oath that he will honestly and faithfully discharge his duties as such attorney, and one of the cardinal duties enjoined upon him by law is to maintain the respect that is due to the court of justice and judicial officers* . . . In the determination of the question as to whether a contempt has been committed, it does not depend upon the intention of the offending party, but upon the act he has done. A disclaimer of intentional disrespect or design to embarrass the administration of justice is no excuse for the person charged with the offense, when the contrary appears, from a fair interpretation of the language used . . . *It is the imperative duty of an attorney to respectfully yield to the rulings and decisions of the court, whether right or wrong, reserving the rights of his client by proper and necessary exceptions thereto. A remedy for the correction of the court's errors, if any, is fully provided by law.*' " (P. 631; italics added.)

involve attorney contempt. To one not trained in the law, application of rules concerning verbalized or conduct contempt should obviously be made with greater hesitancy and less frequency than in the case of an attorney.

The second difference of moment is that in *Little* the United States Supreme Court suggests that a charge of bias on the part of the judge made in plain English cannot constitute contempt unless *either* (a) it was uttered in a loud and boisterous tone *or* (b) actually disrupted the court proceedings. But the court in *Little* took pains to point out: "There is no indication, and the State does not argue, that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding." In the case at bench, however, the order clearly recites that petitioner did speak in a "loud, disorderly, contemptious, insolent and rude manner and tone of voice...." Additionally here, as distinguished from *Little*, there was interruption of the proceedings of the court. As pointed out in the portions of the transcript quoted above, the episode caused the court to recess the case for the purpose of accomplishing further dialogue with counsel out of the presence of the jury. It should also be observed in passing that the remarks cited as contemptuous in *Little* came during the closing argument of the defendant appearing in propria persona. Here the remarks came during the testimony of a witness and the proceedings were clearly interrupted thereby.

I must also disagree with the majority's narrow interpretation of *Little* that a charge of bias against a judge cannot be the basis of a contempt charge unless (a) it was uttered in a loud and boisterous tone, or (b) actually disrupted the court proceedings.

For this proposition, the court in *Little* relied on its earlier decision in *Holt v. Virginia* (1965) 381 U.S. 131 [14 L.Ed.2d 290, 85 S.Ct. 1375], a case presenting a totally different courtroom situation from that involved in either *Little* or the case at bench. *Holt* involved statements contained in a written motion for change of venue read by the litigant's attorney at a hearing on that motion. *No jury was present in Holt*; and the attorney was not engaged in a disrespectful dialogue with the court as here.

A word should also be said about the California requirement of a warning in instances of contempt based on tone of voice or manner. (*In re Hallinan, supra,* 71 Cal.2d 1179.)

The *Hallinan* rule of warning is limited to "statements of an attorney made in open court *the language of which is in itself not insolent, contemptuous or disorderly*..." (p. 1181: italics added).

Although the words involved in this incident are per se contemptuous and therefore required no warning, the rationale of requiring a warning from the court with respect to an attorney's statements is, in my opinion, unrealistic. Language which on its face does not seem to be insolent, or contemptuous or disorderly may very well be all of those things in a given context or setting or in the reflection of a background of days, weeks or even months of trial wherein courtroom contact between attorney and judge is a constant environment.

The consternation of trial judges charged with the duty of maintaining order and dignity in the proceedings over which they preside in attempting to draw sophisticated and artificial lines between those incidents which require a precedent warning and those which do not should be understand-

able by anyone who has experienced this judicially declare! dilemma. (See Goff, *In re Hallinan: Does It Really Shrink the Contempt Power?* (1971) 46 State Bar J. 155.)

A major reason for the warning rule " '*is the fundamental interest of the public in maintaining an independent bar.* Attorneys must be given a substantial freedom of expression in representing their clients.' " (*In re Hallinan, supra,* 71 Cal. 2d at p. 1183; quoting *Gallagher v. Municipal Court, supra,* 31 Cal. 2d 784; italics added.)

But I submit that there is a deeper fundamental interest of the public in maintaining orderly, dignified, court proceedings; and that inherent in this consideration is the necessary ingredient of expecting attorneys who are privileged to participate in the maintenance of this public trust to live up to their responsibilities without being warned or reminded of them in the fashion of a child. The image of lawyers—bench and bar—is today in such poor position in the public view because the legal profession, charged and entrusted with the resolution of many of society's greatest problems, fails to display the maturity required to attain a vitally essential goal—its own self-discipline.

It is time for all members of the legal profession to stand back and take a hard look at ourselves, the positions that we occupy with respect to each other, and most importantly, the fundamental purpose for which courts exist—to serve the public good.

III. *Each of the incidents of contempt comes within the purview of Code of Civil Procedure, section 1209, subdivision 3.*

Code of Civil Procedure, section 1209, provides in part: "The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the au-

thority of the court: . . . 3. Misbehavior in office, or other wilful neglect *or violation of duty by an attorney,* counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;" (italics added.)

Business and Professions Code, section 6068, provides in pertinent part: "*It is the duty of an attorney*: . . . (b) To maintain the respect due to the courts of justice and judicial officers. . . . (f) To abstain from all offensive personality . . ." (Italics added.)

As to paragraph 1 of the order of contempt, petitioner's conduct in refusing to accede to the court's ruling, despite admonition from the court, shows an unequivocal failure to "maintain the respect due to the courts of justice and judicial officers" (Bus. Q Prof. Code, § 6068, subd. (b)).

As to paragraph 2 of the order of contempt, petitioner's intimation that the court was biased in favor of the prosecution, which intimation was made "In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury," clearly constitutes disrespect of the court and judge, a violation of Business and Professions Code, section 6068, subdivision (b), and patently reveals a display of "offensive personality," a violation of Business and Professions Code, section 6068, subdivision (f).

As to paragraph 3 of the order of contempt, the majority correctly holds that it is beyond all doubt that petitioner's false assertion that the judge had called petitioner a liar is contemptuous per se. At the same time it is, per se, a failure to maintain respect (Bus. & Prof. Code, § 6068, subd. (b)), and an unambiguous display of "offensive personality" (Bus. & Prof. Code, § 6068, subd. (f)).

In this state there are approximately 800 trial court judges. In the fiscal year July 1, 1970 to June 30, 1971,

7,762 superior court and 12,260 municipal court juries were sworn to try cases.[5] In 1969-70 the totals were about the same. This court can take judicial notice of the fact that the number of citations of attorney contempt is de minimis when compared the volume of jury cases processed.

It is readily apparent from this brief statistical analysis that the overwhelming majority of lawyers are conducting themselves in the manner required by law and expected by society.

When a lawyer violates his duty, the sanctions of the law should be imposed swiftly. Appellate courts should be scrupulously hesitant to "second-guess" the actions of a trial judge who alone is—to use contemporary vernacular jargon—"where the action is."

If the integrity of our judicial system is to be maintained and if the confidence of the citizenry in it is to be restored, we should broaden, not weaken the authority of the trial courts to control the conduct of those persons—particularly attorneys—who appear there; and the one and only meaningful tool which the law gives to the trial judge to maintain control of lawyers who violate their duty is the power of contempt.

I would affirm the order of contempt in its entirety.

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5. Annual Report of The Administrative Office of the California Courts (Jan. 1972).

APPENDIX I

Appendix I

Municipal Court for the Central Judicial District
County of Sonoma, State of California
Department No. 1

Before Honorable James E. Jones, Jr., Judge of the Central Judicial District, County of Sonoma, State of California.

Filed Nov 23 1971

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*,

vs.

STRA, ET AL, *Defendants*.

TUESDAY, NOVEMBER 23rd, A.D., 1971—
3:00 o'clock p.m.

REPORTER'S TRANSCRIPT
OF
PARTIAL TRANSCRIPT
OF
ORDER OF CONTEMPT PROCEEDINGS

(People versus Stra, et al, partial transcript of proceedings had on Tuesday, November 23rd, A.D., 1971, at the hour of 3:00 o'clock p.m. thereof, before James E. Jones, Jr., Judge of the Municipal Court for the Central Judicial District, Department No. 1, County of Sonoma, State of California.)

THE COURT: Gentlemen, we do have one further thing at this point. This is the matter that came up on Friday. In

this regard, I have prepared an Order of Contempt reciting as follows: Whereas, on Friday November 19, 1971, during the trial of the above-entitled actions before the undersigned, a Judge of the above-entitled Court, Arthur Hernandez, a witness was under examination on the part of the defendant and while the witness was giving his evidence, the attorney for the plaintiff objected to the testimony then being given by the witness, on the ground that said testimony was irrelevant and immaterial. The objection was sustained by the Court, whereupon Aubrey Grossman, one of the attorneys for the defendants did in the immediate view and presence of the Court, commit the following acts: one, after having been repeatedly instructed and admonished by the Court to refrain from such activity and comment, continued to argue after the above-mentioned ruling of the Court had been made and announced. Two, in a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the Jury, accused the Court of exercising different standards of judgment in favor of the prosecution and against the defense in determining the admissibility of proffered evidence. Three, in a loud, disorderly, contemptuous, insolent and rude manner and tone of voice and in the presence of the Jury, falsely accused the Court of calling him a liar. That said act and words were grossly contemptuous of the orderly process and dignity of the Court, and tended to and did interrupt the due course of the trial. Wherefore, it is ordered and adjudged that said Aubrey Grossman is guilty of contempt of Court committed in the immediate view and presence of the Court, and that for such contempt, he is hereby fined in the sum of $500.00 to be paid to the Clerk of the Municipal Court of the Central Judicial District of Sonoma County and that said Aubrey Grossman be committed forthwith to the custody of the

Sheriff of Sonoma County for a period of five days or until further order of the Court; dated this date over my signature.

I will deliver to Counsel on each side copies of the Order and file the original with the Clerk. All right, gentlemen, we will stand recessed.

MR. AUBREY GROSSMAN: Judge, just one minute, please. With reference to the citation, I have certain legal objections to make to the action you have taken and I have certain motions to make with respect to it. Number one, I object. It is improper procedure for you to render a judgment on your citation without permitting me to be heard either by way of a legal argument or by way of a factual presentation. In other words, I have been denied by your judgment. I have been denied any right of defense or of legal argumentation. That is number one; and I ask that you withdraw your judgment, leaving the charge and set the matter for hearing, factual and legal hearing.

Number two, I ask that in advance and for a reasonable, or with reasonable time before that hearing, I be given by the Court a copy of the transcript insofar as it is relevant so that I am in a position to prepare for the hearing.

Number three, because of the obvious personal involvement, subjective reaction of the Court, of the judgment, I ask that this matter be heard before another Judge. In this connection, I, of course, was not prepared. I did not know that this would come and I did not therefore bring together —put together a brief, but I know that the United States Supreme Court has held that a Judge who is so much involved because of the nature of the controversy that proceeded and let's say the nature of the charges made against him, could not be as a matter of law an objective judge and therefore the matter should be referred to another Judge

so that I am making a motion that at the hearing that I have previously requested that another Judge sit who is not personally—was not personally involved in any way in the incident. Just one minute, please. Those are all of the motions I desire to make.

THE COURT: Very well, Mr. Grossman. I feel that had this been a contempt, an indirect contempt not committed in the view and presence of the Court as it is alleged to have been in my Order that your—some of your motions would be valid; however, for such a contempt committed in the way that it was, this becomes a rather summary proceeding as we are both well aware; consequently, I must deny your motions. The contemptor is remanded into the custody of the Sheriff and we will stand recessed until December 2nd.

MR. WARREN B. WILSON: Your Honor, if I may speak just for a moment: at this time I would like to make a record as counsel to represent Mr. Grossman in this matter and request an opportunity of a stay for approximately ten days within which to prepare an appeal of the Order.

THE COURT: Mr. Wilson, I would certainly like to accommodate counsel in that regard. Your conduct has been above reproach; however, as for co-counsel the same I cannot say. Consequently, it is with regret that I have to deny that motion. We will stand recessed until December the 2nd.

(Whereupon, at the hour of 3:08 o'clock p.m. this day, this Order of Contempt proceedings is concluded.)

APPENDIX J

Appendix J

DECLARATION OF AUBREY GROSSMAN

I, the undersigned, say:

During November, 1971, I was one of three attorneys representing the defendants in a group of consolidated cases entitled "People v Gary Stra, et al.", being tried before a jury in the Municipal Court for the Central Judicial District, County of Sonoma, State of California.

The defendants in these cases were a group of American Indians and most of them were of the Pomo Tribe, a tribe indigenous to Sonoma County. They were accused of having violated Sections 602(i), 602(k), and 602(n) of the Penal Code in that they had, on three occasions in November, 1970, occupied and refused to leave certain lands that were the property of another. Their defense was that at the time of the occupation they in good faith believed that the land in question, which had formerly been used by the United States government as a radio listening station, had been abandoned by the government, and that, therefore, they, as American Indians, had the right to occupy it and use it.

I further state that after the colloquy which occurred between myself and the Honorable James E. Jones, Jr. on Friday, November 19, 1971, which concluded by the judge citing me for misconduct and advising that he would take the matter up at the conclusion of the trial, the trial continued for approximately a day and a half, November 22 and 23, 1971, without incident.

With reference to Judge Jones' statements about me in court on August 27, 1971 (Exhibit C) as the judge gave no specifics, I assume he was referring to delay in getting the cases to trial. These delays resulted from the following:

1. At the various times these matters were set for trial, I had previously scheduled criminal trials involving American Indians; and

2. On or about June 21, 1971 I filed a petition for removal of these cases to Federal Court because I in good faith believed that since these cases involved a claim by the defendants that the federally-owned land which they occupied had been illegally taken from them by the Federal Government, the cases came within the Federal Removal Statutes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 1972 at San Francisco, California.

AUBREY GROSSMAN

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-763

AUBREY GROSSMAN, *Petitioner,*

vs.

DONALD STRIEPEKE, Sheriff of County of Sonoma, State of California, *Respondent.*

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Two, dated March 31, 1972, is reported at 24 Cal.App.3d 624, 101 Cal. Rptr. 176 (1972) In addition, petitioner has attached a copy of the opinion as Appendix H to his petition. That opinion likewise reflects the fact that petitioner's request for a hearing was denied by the California Supreme Court on May 23, 1972. 24 Cal.App.3d at 649, 101 Cal.Rptr. at 176.

The order of the United States District Court, Northern District of California, dated July 5, 1972, is unreported.

The original memorandum opinion of the United States Court of Appeals for the Ninth Circuit, dated July 11, 1973, is likewise unreported. Petitioner has attached a copy of the memorandum as Appendix B to his petition. That court's remand order of August 8, 1974, following this Court's grant of certiorari and subsequent remand for reconsideration in light of *Taylor v. Hayes*, 418 U.S. 488 (1974), is unreported. Petitioner has attached a copy of the order as Appendix D to his petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, after being directed by this Court to reconsider its earlier decision in light of *Taylor v. Hayes*, 418 U.S. 488 (1974), properly limited its reconsideration to that of *Taylor v. Hayes* applicability to issues originally raised by petitioner before the District Court and thence on appeal to the Court of Appeals.

   a. Whether the Court of Appeals properly refused to consider the applicability of *Taylor v. Hayes* to an issue first raised by petitioner before this Court in the original petition for writ of certiorari [No. 73-787], where: the issue had not been raised in the California appellate courts; the

issue had not been raised in the petition for writ of habeas corpus in the district court; and, the issue had not been raised in the original appeal before the Court of Appeals.

2. Whether the Court of Appeals, after being directed by this Court to reconsider its earlier decision in light of *Taylor v. Hayes, supra,* properly held that that case did not compel a finding that the trial court judge should have recused himself and have allowed petitioner to be sentenced by another jurist.

3. Whether the contempt citation herein will hamper and limit the scope of argument by counsel in future cases.

STATEMENT OF THE CASE

On November 19, 1971, petitioner Aubrey Grossman, attorney at law, was cited for direct contempt of court by the Honorable James E. Jones, Jr., Judge of the Municipal Court, Central Judicial District, County of Sonoma, State of California. On November 23, 1971, the judge issued an order entitled "Order of Contempt," which found that petitioner had committed three separate acts of contempt on November 19, 1971. The order further adjudged that petitioner be punished by paying a fine of $500.00 and by serving five days in the county jail (CT 10, 11).

Petitioner, on November 29, 1971, made application for a writ of habeas corpus with the Superior Court of the County of Sonoma, State of California. Although habeas corpus relief was denied, the court

stayed execution of the sentence until February 14, 1972.

On December 30, 1971, petitioner filed a writ of habeas corpus in the California Court of Appeal, First Appellate District, Division Two. That court denied the writ without a hearing on January 3, 1972.

On January 12, 1972, petitioner filed a writ of habeas corpus in the California Supreme Court. On February 9, 1972, that Court directed respondent to show cause before the Court of Appeal, First Appellate District, why the requested relief should not be granted.

On March 13, 1972, the California Court of Appeal, First Appellate District, Division Two, heard oral argument and took the case under submission. On March 31, 1972, that court, in denying the requested relief, sustained two of the contempt citations, reversed the third and remanded the case to the trial court for resentencing. This opinion is reported in the official California records of decision. *In re Grossman*, 24 Cal.App.3d 624, 101 Cal.Rptr. 176 (1972).

On May 23, 1972, petitioner's request for a hearing before the California Supreme Court was denied.

On July 5, 1972, petitioner was resentenced. He was ordered to pay a fine of $500.00 and to serve five days in the county jail (CT 7).

On July 5, 1972, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 1). Later that day, the Honorable Albert C. Wollenberg,

United States District Court Judge, considered and denied petitioner's request for a writ of habeas corpus. No. 72-1229 ACW (CT 25).

A certificate of probable cause was issued on July 5, 1972, and a notice of appeal was filed (CT 25, 26). At the same time, petitioner was released from custody pending appeal to the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals received briefs from both parties and heard argument before rendering its opinion. On July 11, 1973, the Court of Appeals sustained the determinations made by the district court, and with some additional comments, concurred in the findings and conclusions made by the California Court of Appeal.

On August 17, 1973, the United States Court of Appeals denied petitioner's request for a hearing *en banc*, and rendered an order clarifying its opinion.

On September 9, 1973, a petition for a stay was filed with this Court. Upon its denial, petitioner surrendered to respondent, Sheriff Donald Striepeke, served a five day jail sentence, and paid a fine of $500.00.

On November 15, 1973, petitioner filed a petition for a writ of certiorari with this Court. Opposition was filed by respondent on January 31, 1974.

On January 8, 1974, this Court issued the following order:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded

> to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Taylor v. Hayes*, 418 U.S. ..... (1974)".

On August 8, 1974, the United States Court of Appeals issued an order, stating that even after further consideration as ordered, it adhered to its previous decision announced July 11, 1973. The Court of Appeals noted that *Taylor v. Hayes, supra*, was relevant to only one of the issues petitioner had raised *before it*, namely the issue of whether the contemned judge should have recused himself. (*See* 418 U.S. at 501-504).

Petitioner filed for rehearing, and suggested the appropriateness of a rehearing *en banc*, on September 23, 1974. On November 20, 1974, the United States Court of Appeals denied the petition for rehearing and rejected the suggestion for a rehearing *en banc*. In pertinent part, the order of that Court provided:

> "On the original appeal appellant failed to raise the issue of whether the state trial court erred in refusing to grant a hearing prior to final judgment and sentencing on the contempt citation, and the error complainted [sic] of is not plain error."

On December 18, 1974, petitioner again sought a writ of certiorari from this Court. Opposition was requested on January 29, 1975, to be filed on or before February 28, 1975.

STATEMENT OF FACTS

Petitioner Aubrey Grossman, attorney at law, appeared in the Municipal Court for the Central Judicial District, County of Sonoma, on November 25, 1970, at the arraignment of his client Gary Stra. This case was consolidated with two others and all were set for trial, to begin on February 9, 1971. The three consolidated cases involved a total of fourteen defendants. On February 3, 1971, the trial date was vacated until Febraary 17, 1971. On February 17, 1971, the trial was reset for May 4, 1971. Subsequently, this trial date was set and then reset for June 22, 1971. On June 16, 1971, petitioner appeared, and the trial date was confirmed for June 22, 1971.

Thereafter, on June 22, 1971, petitioner filed to have the cause removed to federal court. Removal was denied and the cause was remanded back to the Municipal Court on August 23, 1971.

On August 27, 1971, petitioner, acting through another attorney, sought to have the trial date in the Stra cases continued until November. The Honorable James E. Jones, Jr. was most reluctant to grant another extension since the consolidated case involved fourteen defendants, and especially since the matter had first been scheduled for trial more than six months previous. Although the court had theretofore permitted petitioner to postpone the trial a number of times, Judge Jones was adamant that another continuance would not be granted.

In denying petitioner's request to continue the matter another 60 days, Judge Jones stated:

> "[I]nitial charges here were made in November of 1970 and I have on prior occasions had some rather strong words with Mr. Grossman concerning the possible date of trial and I promised him that the matter was going to trial and rather promptly."
>
> "Mr. Grossman has used every tactic that is available and some not too ethical, I believe, to delay the setting of these cases for trial. Now is there any reason why he cannot be ready to go to trial in the month of September?" (August 27, 1971, Transcript p. 3, 4).[1]

Judge Jones commented on petitioner's delaying tactic of filing for removal of the consolidated cases to federal court, saying:

> "Mr. Grossman has tried to make federal cases out of these, but he just hasn't been successful in doing so. . . .
>
> "The Federal Court won't have anything to do with these matters." (RT 4, 5).

Subsequently, Judge Jones set the Stra cases for trial to begin on September 21, 1971 (RT 8). In response to this, Mr. Wilson, the attorney appearing on petitioner's behalf, advised the court of Mr. Grossman's intention to challenge the panel (RT 8). As a result of this statement, Judge Jones observed,

> "Mr. Grossman has done everything to clog the wheels of justice in this County in any event." (RT 8).

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[1]The transcript of August 27, 1971, will hereafter be cited as "RT".

On September 15, 1971, trial was reset for October 19, 1971. Subsequently the trial date was again reset and scheduled for November 16, 1971, on which date it did begin, slightly over nine months after it had first been set.

The third day of trial, the following exchange took place between petitioner and the trial judge:

> "Mr. Gallagher (Prosecutor): Your Honor, I'm objecting. I don't know as it's material for us to go through a litany of–––
>
> Mr. Grossman: You want to know about his activities. You are perfectly willing to ask him whether his activities was going around occupying —just one moment, please.
>
> The Court: Just a moment, please, Mr. Grossman. Let Mr. Gallagher finish first.
>
> Mr. Grossman: I started first. So I'm entitled to finish. Isn't that the rule in this court? If I start, I'm entitled to finish.
>
> The Court: Not when an objection is being stated, Mr. Grossman. You know better than that. If you continue to interrupt in such a fashion, not only will your record be so fouled up that it will never be undone, but I will take more firm steps to see that it doesn't recur, I think I make myself clear, do I not?" (Reporter's transcript of proceedings from November 19, 1971, hereinafter cited as PT: PT 6, 7.)

Although petitioner was warned by the court not to "continue in such a fashion," he did not heed the warning:

> "Mr. Grossman: Very snide kind of legal objection. But now may I reply to it?

The Court: You may.

Mr. Grossman: The question that he asked was, 'so you go around the co[u]ntry occupying.' All right. Doesn't he open the question of whether he does go around the country occupying? So I want to ask him about a place that he did occupy?

The Court: What has that to do with the issues in this case?

Mr. Grossman: Well, then, why did he ask it? I've said it before: If he's willing to open up an irrelevant field, then I'm entitled to redirect or on cross to go into the same field, unless there's a different rule for him than for me.

The Court: Mr. Grossman, you know better than that.

Mr. Grossman: I don't know better than that. So don't say I know better than that.

The Court: Mr. Grossman——

Mr. Grossman: I say what I believe. Don't say I know better than that. You're saying I'm a liar. I'm not a liar, Judge. Don't say I know better than that.

The Court: I cite that as misconduct, Mr. Grossman.

Mr. Grossman: What? That I said you call me a liar?

The Court: Is misconduct. Your whole line of conduct, Mr. Grossman. I think at this time it might be a good place to take our afternoon recess. I think counsel and the Court will have some conversation to engage in which should more properly be done outside the presence of the ladies and gentlemen of the jury. Now, we'll take our recess at this time until 10:00 o'clock on Monday morning. Once again, while we're disbanded, once

again let me remind you of my admonition about discussing the case or forming or expressing any opinions.

I expect counsel to remain.

(The jury recessed at 3:50 o'clock p.m.)

The Court: The record should note that the ladies and gentlemen of the jury have now cleared the courtroom.

Mr. Grossman, I've cited you for misconduct and taken exception of your remarks and the charges, both implied and explicit, that the court has different rules for the prosecution than the defense, and the accusation of judicial misconduct. Now, I would expect, first of all, an apology. Is one forthcoming?" (RT 7-9).

"Mr. Grossman: Well, I would suggest you have the record read back. You did not cite me for misconduct for that. You cited me for misconduct because I said that you were calling me a liar, and I'm no liar. And I suggest, before you engage in ruling on whether I've committed contempt, you better be sure that the record, which you're going to have to depend on, says that. Now, I say you cited me for misconduct for that. And you've realized since then how off base you were, because the remark you made to me, if I may finish, the remark you made to me was not that 'you ought to know better,' but 'you should know better.' And I'm smart enough to know you're calling me a liar before the jury. You're saying, 'You know better,' and I said to you, 'I don't know better and you don't call me a liar.' Now, I've got some rights. And you're prejudicing this jury against me.

The Court: I take it that that is not the form of an apology.

Mr. Grossman: What do you want an apology for?

The Court: Well, then, I need——

Mr. Grossman: I say, what do you want an apology for, what statement?

The Court: For the implications that you made, Mr. Grossman, both implied and explicit.

Mr. Grossman: Well, now—now we get to the nitty-gritty. If—if you're expecting a simple, formal apology of some kind, I'm perfectly willing to give it.

The Court: No, I'm not expecting a formal apology of some kind.

Mr. Grossman: Let me finish. I'm going to use words very precisely. If you want something that we often do, you know, you have an argument and you say you have an apology, I'm perfectly willing. I don't stand on principle or anything like that. But if you want me to say that I didn't mean the words I used when I said that I thought you were ruling in opposite ways, depending upon who made the objection, if you want me to say I lied, then, or I didn't mean it, then, if I apologize with that meaning, I would be lying. Because I still feel as I felt then, that your rulings, carefully analyzed, will show that it depends on whether the prosecution or the defense makes an objection or asks the question as to how the ruling's going to go. That's my belief. If I'm wrong, I'm wrong. But that happens to be my belief. And I think the record will show that I didn't say that—I think I asked the question. I meant to imply I thought that was true. But what I was trying to do was to get you to change your rulings on this point, because I felt the

ruling on this point proved conclusively this question of whether there is a discriminatory way. Now, let me go back to the thing that started it all. It is a principle that I have never seen denied by any judge that, if one counsel opens up a question whether it be hearsay or irrelevant, then the other counsel cannot be foreclosed from entering it. And if your Honor has ever seen a case or has ever seen a judge rule differently, tell me about it. I have never in the thirty-five years I've been practicing. Now, I think we ought to we ought to recognize that you made a mistake. Maybe you were rushed; maybe it was my fault you made it. Judges can make mistakes like anybody else. Maybe we can clear the air. Maybe I'll apologize, but maybe you'll say, 'Perhaps I made a mistake in my ruling,' and let's clear the air. I'm perfectly willing.

The Court: I'm not talking about the ruling, except——

Mr. Grossman: Well, your ruling started it; your ruling started it. You can't forget how it started.

The Court: Then, Mr. Grossman, I reaffirm my prior indication and I do hold you in contempt. I cite you for misconduct. And I will take that matter up at the conclusion of this trial. We'll stand recessed until——

Mr. Grossman: Just a minute, now.

The Court: We'll stand recessed until 10:00 o'clock——

Mr. Grossman: Just a minute, just a minute.

The Court: We're standing recessed.

Mr. Grossman: I am entitled to know something—it's a matter of due process—what I'm being cited for contempt for."

On November 23, 1971, upon conclusion of the trial, Judge James Jones presented petitioner with the order of contempt and sentenced him to pay a fine of $500.00 and serve five days in the county jail.

The order of contempt charged petitioner with performing the following acts in the immediate view and presence of the court:

> "[1] After having been repeatedly instructed and admonished by the Court to refrain from such activity and comment, continued to argue after the above-mentioned ruling of the Court had been made and announced.
>
> [2] In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, accused the Court of exercising different standards of judgment in favor of the prosecution and against the defense in determining the admissability of proffered evidence.
>
> [3] In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, falsely accused the Court of calling him a liar.
>
> That said act and words were grossly contemptuous of the orderly process and dignity of the Court, and tended to and did, interrupt the due course of the trial." (CT 10, 11).

The second and third citations of contempt were sustained by the California Court of Appeal and are thus still at issue in this proceeding.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY LIMITED THE SCOPE OF ITS "FURTHER CONSIDERATION IN LIGHT OF TAYLOR v. HAYES" TO THE ISSUE OF WHETHER THE STATE TRIAL JUDGE HAD BECOME SO PERSONALLY EMBROILED WITH PETITIONER THAT HIS RECUSAL WAS DEMANDED. THE APPLICABILITY OF A SECOND ISSUE DISCUSSED IN TAYLOR, THAT OF THE NOTICE AND RIGHT TO SPEAK IN ONE'S BEHALF REQUIRED WHEN CITATION FOR SUMMARY CONTEMPT OCCURS DURING TRIAL BUT FORMAL ADJUDICATION AND SENTENCING IS DELAYED, WAS PROPERLY NOT CONSIDERED BY THE COURT OF APPEALS, BECAUSE: THE ISSUE WAS NOT RAISED IN THE STATE APPELLATE COURTS; THE ISSUE WAS NOT RAISED IN THE ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS IN THE DISTRICT COURT; THE ISSUE WAS NOT RAISED IN THE COURT OF APPEALS IN THE ORIGINAL APPEAL; AND, THE ERROR FIRST COMPLAINED OF IN THE FIRST PETITION FOR WRIT OF CERTIORARI WAS NOT OF SUCH DIMENSION THAT THIS COURT COULD HAVE THEN CONSIDERED IT.

A. A Brief Comparison of the Positions Asserted by the Parties Concerning When the "Notice and Hearing" Issue (Taylor II) Was Raised.

The overwhelming majority of petitioner's instant prayer before this Court is addressed to the applicability of one section of *Taylor v. Hayes, supra,* to his own situation. That section in *Taylor* was denoted "II" by this Court (418 U.S. at 496-500); respondent will henceforth refer to it by the shorthand notation *Taylor II.*[2]

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[2]Section I of the *Taylor* opinion is not at issue here. Section III, dealing with the need for recusal of the contemned judge (418 U.S. at 501-504) is at issue, and will henceforth be referred to by use of the parallel notation *Taylor III.*

Before he can urge that that section should have caused a reversal of the original Court of Appeals opinion, petitioner must persuade this Court that the issue to which *Taylor II* speaks was raised in the Court of Appeals. (*See* Petn. Cert. at 25-36). His argument is that the issue was raised in the state trial court, was not raised in the United States District Court in the petition for writ of habeas corpus, but was thereafter raised by implication in the United States Court of Appeals on the original appeal, and was, in any event, explicitly raised before this Court in the original petition for writ of certiorari.

Petitioner's assertion as to when the issue was raised is disputed by the Court of Appeals. That court's order of November 20, 1974, states unequivocally that the issue was *not* raised by petitioner in the first appeal (Petn. Cert. APPENDIX D). The order is silent as to whether the issue was raised in the state courts. Respondent likewise contends that the issue was not raised before either the district court or the Court of Appeals. In addition, however, it is here asserted that petitioner did not raise the issue in the California appellate courts. It is this latter failure to perfect his claim which must now have the most serious consequences for petitioner's cause.

B. Why Does It Matter When the Issue Was Raised?

(1) In the Federal Courts.

When the *Taylor II* issue was raised is important for one reason only: knowledge of the fact defines the posture in which the cause first reached this Court. Because this Court's remand order directed

only that there be a further consideration of *that same cause*, the Court of Appeals was limited in its reconsideration to such discussions in *Taylor* as were addressed to issues before the Court of Appeals originally, *i.e.*, to a reconsideration including *Taylor III*, but not including *Taylor II*. Thus, it must be considered whether the *Taylor II* issue was before the Court of Appeals originally.

Petitioner ends his discussion on that point by asserting that if doubt exists, it should be resolved in his favor (Petn. Cert. 35-36). Respondent begins by riposting that there is no room for such "doubt", given the Court of Appeals finding that the issue had not previously been before it. In the absence of other considerations, that finding is dispositive. Whether that finding is correct is the only possible concern now.

If the Court of Appeals was correct that the issue was not previously raised, it follows that this Court ordinarily could not have considered it for the first time on petition for writ of certiorari. *Swenson v. Stidham*, 409 U.S. 224, 231 (1972); *United States v. Fleischman*, 339 U.S. 349, 365 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *but see* Supreme Court Rule 40(1)(d)(2). Petitioner would have had to have demonstrated to the Court of Appeals not only the precise nature of his claim, but also that the claim was constitutionally grounded. *Bailey v. Anderson*, 326 U.S. 203, 207 (1945). He did neither, hence review of the issue would not have been proper.[3]

[3]The answer petitioner must make is that the alleged failure to allow him the sort of "hearing" specified in *Taylor II* constituted "plain error", of a grossness such as would forgive any require-

Vachon v. New Hampshire, 414 U.S. 478, 479 (1974) (dissenting opinion of Rehnquist, J.)

Petitioner urges that the issue was raised in the original appeal to the Court of Appeals, for two reasons. First, he contends that the issue was raised because he stated in his statement of the case section of the appellant's brief that he had asked for a hearing in the state trial court (Petn. Cert. 32). Were petitioner to make a similar argument before this Court, it would not succeed. *Connecticut Ry. Co. v. Palmer*, 305 U.S. 493, 496-497 (1939). Similarly, the United States Court of Appeals for the Ninth Circuit would not consider any issue only hinted at in a factual description of the case. *Flemings v. Wilson*, 365 F.2d 267 (9th Cir. 1966).

Second, petitioner asserts that the hearing issue discussed in *Taylor II*, which he did not specifically articulate, was raised because the recusal issue discussed in *Taylor III*, which he did articulate, ". . . tended to merge . . ." with the other (Petn. Cert. at 29-31, 32-34). As another passage of petitioner's in-

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ment that the issue be properly perfected. *See also* Fed. Rules of Crim. Proc. 52(b); *United States v. Atkinson*, 297 U.S. 157, 160 (1936). That answer fails to account for the fact that the case has previously been before this Court. If the alleged failure to accord a *Taylor II* hearing is now plain error, it was equally so then. This Court could then have simply reversed on that precise ground. But no such extraordinary action was taken. Rather, the case was remanded for further consideration in light of *Taylor*. While respondent shares the commentators' mystification as to the substance behind the label "plain error"—3 Wright, *Federal Practice and Procedure*, section 856, at 373-374—it is of primary importance that this Court has previously been presented with the opportunity to declare "plain error" existed in this case, and declined to do so. That refusal lends specific substance to the label as applied in this case.

stant pleading before this Court indicates,[4] he views the "hearing" contemplated in *Taylor II* and that contemplated in *Taylor III* as being *the same hearing*. This position apparently is that one must first demonstrate the right to a "hearing" (in the sense in which *Taylor II* uses that term) before he is entitled to claim that the trial judge must recuse himself, thus permitting a "hearing" (in the *Taylor III* sense) before another judge. That petitioner views the "hearings" as being one and the same is obvious. The point is also critical to his argument, since if the "hearing" is the same in both instances, by arguing for it in one way, he has impliedly argued for it in other ways as well. Such must be the argument petitioner makes.

The problem with the argument is that the term "hearing", if applied to the *Taylor II* and *Taylor III* situations, contemplates two distinct proceedings, both as to purpose and scope.[5] To fully delineate those differences, one must begin by noting that there are three basic factual postures in which a contempt case might come before this court. In the first, the contemnor is cited, adjudicated, and sentenced for his contempt all at the same time. Of this type of case, it may be remarked that the contempt is direct, and that all aspects of the judicial response are handled instantly.

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[4]". . . for unless petitioner had a right to a hearing in the first instance, it would have been pointless to have argued the embroilment issue, which turns on the right *to a hearing* before another judge." (Petn. Cert. 29) (emphasis in original).

[5]It was T. S. Eliot who remarked, ". . . words strain/crack and sometimes break, under the burden,/Under the tension, slip, slide, perish, Decay with imprecision, will not stay in place,/Will not stay still . . ." in "Burnt Norton", from *The Four Quartets*.

Even in such a case, "the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi v. Leslie*, 404 U.S. 496, 504-505 (1972); *see Levine v. United States*, 362 U.S. 610, 613-614 (1960). A second case is so-called "indirect" contempt in which the contumacious behavior occurs out of the contemned jurist's presence. Because the jurist has not witnessed the behavior personally, any action by him logically will depend on what he is told by others. Thus, a full hearing with notice and the right to cross-examine witnesses, is appropriate. Rule 42(b), Fed. R. Crim. P.; *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971). At stake in this "hearing" is the very legal correctness of any contempt adjudication: "allocution" does not go to that same correctness. The third case, of which the instant action is an example, involves direct contempt behavior committed in the presence of the judge. However, if it occurs during an ongoing trial, and if the contemnor is an attorney involved in that trial, the rights of the parties to the litigation must be compromised by instant adjudication and sentence. Hence, it usually happens that the contemnor is cited for contempt, and advised that formal adjudication and sentencing will occur at the conclusion of the court's business. *See, e.g. People v. Fusaro*, 18 Cal. App.3d 877, 889-890, 96 Cal.Rptr. 368, 375-376 (1971). Because these formal requisites are delayed, however, one of the justifications for summary action, necessity, [*see Offutt v. United States*, 348 U.S. 11, 14 (1954)] is no longer cogent. *Taylor v. Hayes, supra*, 418 U.S. at 497; *see also United States v. Meyer*, 462 F.2d 827,

838 (D.C. Cir. 1972). Thus, any "hearing" will be in the nature of an expanded allocution, with the contemnor given the opportunity, for example, to urge "that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client". *Taylor v. Hayes, supra*, 418 U.S. at 499. The contemnor might also present matters in mitigation or might try to apologize to the court. *Id.* The "hearing" is not the same full-scale inquiry that is contemplated by Rule 42(b) for indirect contempt cases. The *Taylor II* "hearing" is somewhere between bare allocution and a full-scale trial proceeding. Because direct contempt is still involved, however, the "hearing" must still be closer to the former procedure than to the latter.

When the issue is whether the contemned jurist must recuse himself because he has become "embroiled" with the contemnor, *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), an affirmative answer to that question will result in another hearing on the contempt before a new judge. *Taylor v. Hayes, supra*, 418 U.S. at 501-502. The second judge will conduct a full inquiry into the charges, and determine their legal sufficiency. *Mayberry v. Pennsylvania, supra*, 400 U.S. at 466. The reason for a full-scale proceeding is not difficult to suggest—as to the second judge, who has not witnessed its occurrence, the contempt is an indirect one. Thus, the "hearing" contemplated in *Mayberry* and in *Taylor III* is the one appropriate for indirect contempts: a full trial-type inquiry into the legal sufficiency of the charges.

The upshot is that petitioner is incorrect to contend that *Taylor II* and *Taylor III* speak of the same (or even of a set of analogous) "hearing" rights. It is quite possible to argue that the contemned judge here should have recused himself and so permitted a full hearing before another judge, without thereby saying anything about the hearing the contemned judge himself (if found not to be embroiled) was bound to afford petitioner. The two issues do not inevitably "merge"; they are logically independent, each of the other.

Neither of petitioner's reasons are sufficient to persuade that the *Taylor II* issue was raised in the Court of Appeals originally. It should further be noted that not even petitioner contends the issue was aired in the original habeas corpus petition filed in the district court. Failure to raise the issue there provided added reason for the Court of Appeals to refrain from later considering it, even assuming it had been raised for the first time on appeal. *Macon v. Craven*, 457 F.2d 342, 343 (9th Cir. 1972); *Hughes v. Wilson*, 365 F.2d 595, (9th Cir. 1966); *Flemings v. Wilson, supra; cf.* Rule 30, Fed. R. Crim. P.

Because the issue was never raised in federal court at any time prior to the first petition for certiorari, and because any possible error was not in the nature of "plain error" such as would have justified this Court in annulling the contempt citations at that time, the remand order could not have included any direction that the Court of Appeals consider the *Taylor II* issue. *Swenson v. Stidham, supra.*

(2) In the State Courts.

Petitioner does not consider the implications of a far more serious failure to raise the issue. As to when the issue was raised in the state courts, he says only that the trial court was informed of his demand for a hearing. (Petn. Cert. 25-28, APPENDIX I). There is no contention that any California appellate court was presented with the issue, as indeed there could not be. Yet it is precisely this failure, to present his claim to the California appellate courts, which should be of paramount concern now.[6]

When this case began its tortuous procession through the federal courts, it came in the procedural cloak of an action brought under Title 28, United States Code section 2254. It was a petition for a writ of habeas corpus to secure release from custody imposed by the State of California. It goes without saying that the action had to comply with all requirements of Title 28, United States Code section 2254. That section in pertinent part provides:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted

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[6]It is undisputed that petitioner raised the embroilment issue before the state courts. *In re Grossman, supra*, 24 Cal.App.3d at 631-632, 101 Cal.Rptr. at 180-181. Thus, it is fair to assume petitioner would argue his "merger" theory there as well. For the reasons already suggested, the theory is no more persuasive as to the California courts than as to the federal panels.

The California Court of Appeal did not consider the *Taylor II* issue, as is indicated by its citation of *Groppi v. Leslie, supra*, in another context. *In re Grossman, supra*, 24 Cal.App.3d at 631 n. 3, 101 Cal.Rptr. at 180 n. 3. That court was aware of *Groppi*, but was not advised of its precise impact by petitioner.

> the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[7]

See also Title 28, United States Code section 2254(c). Since the *Mayberry (Taylor III)* issue had been raised all through the state courts, raising of it in the district court was eminently proper. The same cannot be said of the *Taylor II* issue. It was not raised in the state appellate courts, hence there would have been a failure to exhaust state remedies as to it had the issue appeared in the original petition for writ of habeas corpus. It has already been shown that the issue was not raised in the federal courts until the petition for the writ of certiorari. The combined effect of these two failures, to exhaust state remedies, and to even attempt to raise the issue in the lower federal courts, was to absolutely preclude consideration of the issue by this Court. *Picard v. Connor*, 404 U.S. 270, 275-276 (1971).

The failure to exhaust carries yet another implication. Had the failure to raise the *Taylor II* issue occurred in the federal courts only, respondent still

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[7]Petitioner could conceivably contend that the California appellate process was ineffective to vindicate his *Taylor*-type rights. The argument would have to be that the California courts had demonstrated by their handling of his case a marked disinclination to afford him the due process rights enunciated by this Court. Any such argument would have to fail. The California Supreme Court, after all, retransferred the cause to the California Court of Appeal, with directions to reconsider in light of this Court's then newly-announced decision in *In re Little*, 404 U.S. 553 (1972). *See In re Grossman, supra*, 24 Cal.App.3d at 627, 101 Cal.Rptr. at 178.

would be forced to account for the possibility of "plain error", especially as contemplated in Rule 40 (1)(d)(2) of this Court. The failure to exhaust adds a new dimension to any consideration of "plain error". If even the possibility of "plain error" in petitioner's case is recognized, the effect must inevitably be to undercut the exhaustion requirement. That undercutting would be especially ill-advised, as the requirement goes to the heart of "our dual system of government". *Picard v. Connor*, *supra*, 404 U.S. at 275; *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

Petitioner's failure to exhaust and his presentation of the issue for the first time before this Court when he had always been aware of the circumstances generating the issue was, simply put, an abuse of the federal habeas corpus remedy. *Sanders v. United States*, 373 U.S. 1, 10 (1963); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924). He was presumably aware of *Groppi v. Leslie*, *supra*, upon which the holding in *Taylor II* was expressly bottomed (418 U.S. at 498-499). There is no question here of petitioner being "surprised" by a new legal rule, *compare Silber v. United States*, 370 U.S. 717 (1962) hence a final possible justification for application of the "plain error" doctrine to petitioner's case vanishes.

(3) Conclusion.

This Court could not have considered the *Taylor II* issue when it was raised for the first time in the original petition for writ of certiorari. The Court of Appeals had not previously considered the issue, as indeed it could not, given the failure to exhaust. When

the cause was ordered returned to the Court of Appeals, nothing could be implied in the order that the *Taylor II* issue be considered for the first time in the Court of Appeals. Mere passage of time could not forgive the need to exhaust state remedies. The Court of Appeals was therefore correct, insofar as it declined to consider the *Taylor II* issue.[8]

II

ON RECONSIDERATION OF THE CAUSE, THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL JUDGE WAS NOT "EMBROILED" WITH PETITIONER, WITHIN THE CONTEMPLATION OF TAYLOR v. HAYES, 418 U.S. 488, 501-504 (1974).

The Court of Appeals reconsideration order of August 8, 1974, evidencing an intent to stand by its previous decision, was eminently correct. That order stated that the Court of Appeals had been unable to find a "likelihood of bias" or an "appearance of bias" sufficient to indicate that the trial judge had become "embroiled" within the meaning of *Taylor v. Hayes, supra.* (Petn. Cert. APPENDIX E). On its face, the order reveals that the Court of Appeals channelled its analytic efforts in the directions mandated by *Taylor* (and by *Mayberry v. Pennsylvania, supra,* before that). In result, the order demonstrates a reasonable conclusion that petitioner's case is distinguish-

[8]Respondent submits, however, that the Court of Appeals was incorrect to rest its decision on the belief that the issue did not raise "plain error". The better course would have been to hold that failure to exhaust was the reason for that court's order.

able from *Taylor III*. Not surprisingly, petitioner disputes the accuracy of both the analysis and the conclusion.

A. The Court of Appeals' Analysis: Did That Court "Read" Taylor III Correctly?

(1) Petitioner's Contention Summarized and Evaluated.

According to petitioner, *Taylor III* "expands" the *Mayberry* test for gauging embroilment (Petn. Cert. 58). Apparently that expansion is so great as to mean that if there is *not* embroilment present, neither is there contempt. (Petn. Cert. 60). That is, petitioner seems to believe that the presence of contempt necessarily involves the presence of embroilment. In further support of the assertion, petitioner cites footnote 10 of this Court's opinion in *Taylor*. (Petn. Cert. 60).

The problems with petitioner's argument commence upon any close scrutiny of that footnote. It indicates only, that in addition to the contemnor's conduct, the conduct of the contemned judge is a factor which might argue for recusal. 418 U.S. at 503 n. 10. Indeed, it is only the prevalence of the second factor in *Taylor* which distinguishes that case from *Mayberry*, in which the contemnor's conduct was of primary import. Properly read, *Taylor* does not enlarge or expand *Mayberry*, but only indicates that embroilment may arise from a different source, and provides a concrete example of it.

Finally, it is not correct that *Taylor* has, in effect, equated "contempt" and "embroilment". Consider the situation where the contemnor is at all times respect-

ful and courteous, yet by his actions causes a disruption of the court, and where the contemned jurist acts at all times with restraint. No embroilment exists, yet the contempt has occurred. *Bell v. Hongisto*, 501 F.2d 346, 357 n. 13 (9th Cir. 1974) (attorney refused to proceed with trial before judge after disqualification motion ruled untimely).

(2) The Nature of Embroilment.

In *Mayberry v. Pennsylvania, supra*, this Court was presented with the situation of a direct contempt being cited instantly, but adjudicated and sentenced subsequently. Because both adjudication and sentencing were deferred, any inference of a need for immediacy vanished, and any subsequent summary treatment had to be justified on the grounds of conservation of scarce judicial resources, *i.e.*, that the contemned judge was most competent to interpret the facts and apply the law. *United States v. Meyer, supra*, 462 F.2d at 836-841. That rationale depends for its efficacy on the actual ability of the contemned judge to act as a competent fact finder. It is that ability which *Mayberry* first scrutinized.

The scrutiny is of the contemned judge, from both personal and institutional perspectives. The former, personal scrutiny, is made necessary by a natural doubt about the judge's ability to avoid being biased against the contemnor. The latter, institutional scrutiny, is necessary due to a consideration ". . . that where the judge has been personally, vilified the appearance of justice is sacrificed if the vilified judge

acts as the prosecutor, fact finder, and sentencer *even if the vilified judge is totally unbiased." Guzzell v. Wainwright*, 481 F.2d 405, 406-407 (5th Cir. 1973). (Emphasis supplied).

Any inquiry from a personal perspective is concerned with: (1) the nature of the attack on the judge, whether addressed to him personally or to his office generally; (2) any indication the judge himself gives of losing control; (3) the extent of the vilification; (4) the actual words spoken. The more personal the attack on the judge, the more likely it is that recusal is appropriate. *Mayberry v. Pennsylvania, supra*, 400 U.S. at 464; *see also Ungar v. Sarafite*, 376 U.S. 575, 580 (1964). Similarly, any indication the judge gives, as by affirmatively assuming an "adversary" posture *vis à vis*, the contemnor, may necessitate recusal. *Taylor v. Hayes, supra*, 418 U.S. at 503k, n. 10; *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); *cf. Johnson v. Mississippi, supra.*[9] The extent of the vilification and the actual words spoken both relate to the nature of the attack on the judge, and are thus further glosses on the primary *Mayberry* concern, acts by the contemnor.

In his concurring opinion in *Mayberry*, Chief Justice Burger noted, "Our holding . . . does not reflect on his [the contemned judge's] performance; it re-

[9]Where the "adversariness" results from forces outside the contemned jurist's personal control, it is probable that an institutional inquiry is appropriate. In *Johnson*, for example, the judge was a defendant in a civil rights suit previously instituted by the contemnor.

lates rather to a question of procedure." 400 U.S. at 469. Under certain circumstances, because of unique relationships, there is created the unacceptable likelihood of bias, no matter how calm the judge. *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955). It is possible to identify certain relationships which have given rise to the likelihood. An extreme sentence, such as the 22 year term of imprisonment imposed in *Mayberry*, raises the spector of bias. *Mayberry v. Pennsylvania, supra*, 400 U.S. at 469 (concurrence of Harlan, J.); *Taylor v. Hayes, supra*, 418 U.S. at 502-503 (4½ years imprisonment, disbarment from further practice before contemned court). On the other hand, listening to the contemnor's explanation, or to any motions he wishes to make, would tend to indicate a lack of "embroilment." *In re Chase*, 468 F.2d 128, 136 (7th Cir. 1972); *cf. Groppi v. Leslie, supra*, 404 U.S. at 506.

What has been said about embroilment generally makes it possible to distinguish between *Mayberry* and *Taylor* specifically. The latter case focuses on those indications the contemned judge *himself* gave of becoming embroiled. It is the jurist's response which is of concern, 418 U.S. at 502-503, together with any institutional consideration applicable. (In *Taylor*, the sentence was excessive, and the trial judge threatened to gag the contemnor).

(3) The Court of Appeals' Order.

As noted, the Court of Appeals accounted for both the likelihood of bias (institutional considerations)

and the appearance of bias (personal considerations). On the face of the order it appears the Court of Appeals correctly identified the legal issue assigned it by this court's remand order. *Taylor v. Hayes, supra,* 418 U.S. at 501.

B. The Court of Appeals' Conclusion: Did that Court "Apply" Taylor III Correctly?

Petitioner contends that his case cannot be distinguished from *Taylor* because: (1) in both cases, disparaging remarks were made by the trial judges concerning the attorney's ethics; (2) in both cases, maximum sentences were handed down and bail pending appeal refused. (Petn. Cert. 58-59).

As to the disparaging remarks, those in *Taylor v. Hayes, supra,* were continuing, numerous, and increasingly vitriolic, so much so that they could be characterized as "a running controversy". 418 U.S. at 501. The comment cited by petitioner is isolated, and is not repeated in later, more biting forms. Finally, the comment appears to have a definite reason behind it. Petitioner had heard the trial date reset for June 22, 1971. He appeared to confirm the date on June 16, 1971. He then waited until the date set for trial before filing to have the cause removed to federal court. It was this last minute filing, which definitely caused the proceeding to be disrupted, which occasioned the trial court's remark (Petn. Cert. 58, n. 9). This case simply does not demonstrate the increasing anger on the part of the contemned judge which caused recusal in *Taylor v. Hayes, supra.*

In both cases, bail pending appeal was denied. Yet it is not that which *Taylor* says reflects embroilment, but rather the severity of the sentence. 418 U.S. at 502-503. What distinguishes this case from *Taylor* is the fact that here the sentence was of five *days* imprisonment, not over four *years*. The sentence does not create the likelihood of bias, as it is within the allowable punishment limits for summary direct contempt provided by California statute. Calif. Code of Civil Procedure section 1218.

Because the cases are vastly different in degree, and are distinguishable, the Court of Appeals could reasonably conclude that a reconsideration in light of *Taylor v. Hayes, supra,* necessitated no new result.

III

PETITIONER'S CONTENTION THAT HIS CONTEMPT CONVICTION WILL RESULT IN A "CHILLING EFFECT" ON HIS AND OTHER ATTORNEYS' DUTY TO ARGUE FORCEFULLY ON BEHALF OF THEIR CLIENTS IS WITHOUT MERIT; THE REMARKS CITED AS CONTEMPTUOUS BELOW PASSED FAR BEYOND ACCEPTED LIMITS OF ADVOCACY.

Although there is no vested right in an individual to practice law, there is a right in the court to protect itself, and hence society, as an instrument of justice. *In re Isserman*, 345 U.S. 286, 289 (1953).[10]

---

[10]This Court has also ruled that disbarment, following a contempt citation, is not excessive or vindictive punishment. "Such an attitude misconceives the purpose of disbarment." *In re Isserman, supra.*

Any possible disciplinary proceedings pending against petitioner are not dependent upon any ruling by this Court. Disbarment or

Counsel, however, does have the right to press a claim even if it appears farfetched and untenable.

> "Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation." *Sacher v. United States,* 343 U.S. 1, 9 (1951).

In the instant case, Mr. Gallagher, the prosecutor, began to make an objection to petitioner's line of questioning. However, before Mr. Gallagher could fully make the objection, he was interrupted by petitioner. The trial court judge asked petitioner to allow the prosecution to finish his objection, but instead petitioner began arguing with the Court. The Court warned petitioner not to interrupt again; however, he did not heed the warning.

> "Mr. Grossman: Well, then why did he ask it? I've said it before: If he's willing to open up an irrelevant field, then I'm entitled to redirect or on cross to go into the same field, unless there's a different rule for him than for me.
>
> The Court: Mr. Grossman you know better than that.

---

other disciplinary proceedings can be brought without the necessity of a conviction.

Thus, petitioner's allegation that disciplinary proceedings are pending against him, even if considered, affords him no greater claim to relief. If the acts constituted contempt, as found by the state courts, disciplinary proceedings are indeed appropriate. *In re Isserman, supra.*

> The Court: Mr. Grossman——
>
> Mr. Grossman: I say what I believe. Don't say I know better than that. You're saying I'm a liar. I'm not a liar, Judge. Don't say I know better than that.
>
> The Court: I cite that as misconduct, Mr. Grossman."

The above passage indicates that petitioner interrupted the Court after he had been warned that his conduct was improper. This conduct can not in any stretch of the imagination be viewed as "advocacy". Rather it is illustrative of counsel placing his own emotions above his client's needs and rights. As a result of petitioner's outburst, *on his own behalf,* the trial was recessed and the jury was sent home for the day. Petitioner's conduct and the obstruction it caused in the administration of justice amounted to contempt. *See In re McConnell,* 370 U.S. 230 (1962).

Petitioner and any other attorney should not feel constrained to abandon or limit argument when pursuing a legitimate legal issue. However, when the Court is engaged in argument which is not purposeful, but only vengeful, a citation can be expected. *See Ungar v. Sarafite, supra; Sacher v. United States, supra.*

Since this Court has defined the parameters of legitimate argument, and attorneys can look to these decisions for guidance, there is no merit to petitioner's contention that this case will cause a "chilling effect" on future advocacy by counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
February 27, 1975.

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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1974

No. 74-763

Aubrey Grossman,

Petitioner,

vs.

Donald Striepeke, Sheriff of
County of Sonoma, State
of California,

Respondent.

PETITIONER'S REPLY BRIEF

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INDEX OF AUTHORITIES

Cases	Pages
Cooke v. United States, 267 U.S. 517	3,4,7
Ex Parte Terry, 128 U.S. 289	3,4,7
Taylor v. Hayes, 494 S.W. (2d) 737	1,4,7,8

PETITIONER'S REPLY BRIEF

Respondent's brief makes a new argument, to-wit: Petitioner is not entitled to benefit from the decision in Taylor on the "right of a hearing" issue because he did not raise this issue in the Federal courts or the California appellate courts. He will demonstrate that this claim (which is, incidentally, unsupported by the Response) is simply not true.

When Judge Jones refused Grossman either a temporary stay or bail, and he was thereby imprisoned, under the stress of time-urgency a handwritten petition was prepared and filed in the Superior Court. It is set out as Exhibit A. As can be seen the Mayberry issue was not even stated and the "right to an hearing" issue was the only issue specifically described.

The Petition resulted in the issuance of an order to show cause hearing which recites, as the sole ground for its issuance, that

> "the Judge cited said Aubrey Grossman for direct contempt, without a hearing, at the close of the trial of aforesaid case."

After the Superior Court declined to issue a permanent Writ of Habeas Corpus the next filing was a Petition for Writ of Habeas Corpus in the California Supreme Court. Together with the Petition was filed a Memorandum of Points and Authorities. Point I of the Argument was

> "As the trial judge had become personally embroiled with Petitioner, he had a duty to refer Petitioner's alleged contempt for trial by another judge."

The very first argument under this point was:

> "The power to hold a person in contempt of court by summary process is

'arbitrary in its nature and liable to abuse...', Ex Parte Terry, 128 U.S. 289, 313 (1888). The exercise of this power 'is a delicate one, and care is needed to avoid arbitrary or oppressive conditions.' Cooke v. United States, 267 U.S. 517, 539 (1925). The courts have, therefore, limited the power to impose summary punnishment for contempt to 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat (19 U.S.) 204, 231 (1821).

The cases cited and the quotations therefrom make abundantly clear that Petitioner's attorneys believed that, in the then state of the law, there was an integrated relationship between "the right to a hearing" and the "right to an unbiased judge". They further believed that the necessary argumentation was, first, the desirability of providing a hearing and avoiding summary punishment and, second, the enlargement of the "right to an unbiased judge".

We point out, in passing, that

Petitioner's lawyers' prescience is established by comparison with Taylor. In Taylor, also, the Court begins with the "right to a hearing," and, incidentally, relies on two of the three cases cited by Petitioner's counsel. Ex Parte Terry, 128 U.S. 289; Cooke v. United States, 267 U.S. 517.

The integration of these two rights is further asserted, in the same Memorandum in these words:

> "The trial being over, there was no reason why the trial court could not have ordered petitioner to show cause before a different judge why he should not be held in contempt. In that way, there would be not the slightest possibility that the question of contempt would be decided by a judge with any possible prejudice toward petitioner. Furthermore, the making of such an order to show cause would have afforded petitioner an opportunity to appear, represented by counsel with a clear notice of what the alleged contempt was and an opportunity for his counsel to study the transcript, read the pertinent

cases on the law of contempt, and argue the same in court."

Such an integration of the two rights was conceded by the Attorney General and the District Court of Appeal (to which the Supreme Court assigned the case). In his Points & Authorities, attached to his Return, the Attorney General states his first argument thusly:

> "Argument I. There is No Evidence Which Indicates that the Honorable James E. Jones, Jr. was Personally Embroiled with Petitioner, Thus He was Qualified to Hear the Contempt Case.
>
> "A trial court has inherent statutory power to exercise reasonable control over the trial in order to insure the orderly administration of justice and to maintain the dignity and authority of the court it has power to punish summary contempts committed in its immediate view and presence." [citing cases having nothing to do with recusal].

Examination of the opinion of the Court of Appeal will demonstrate that

it also (together with Petitioner and the Attorney General) began its discussion of the "embroilment" argument by citing cases on "right" to impose summary punishment. It takes care to define "summary" as referring to the character of the contempt proceeding, not its timing. (Petition for Writ of Certiorari, pg. H7).

The next court we come to is the United States District Court. There a Petition for Habeas Corpus was filed together with a Memorandum. The first point in the Memorandum is:

> I. AS THE TRIAL JUDGE HAD BECOME PERSONALLY EMBROILED WITH PETITIONER, DUE PROCESS REQUIRED THAT HE RECUSE HIMSELF AND REFER PETITIONER'S ALLEGED CONTEMPT FOR HEARING BEFORE ANOTHER JUDGE."

The argument is opened on this point, just as it was in the California Supreme

Court Memorandum. We quote the first paragraph:

> "The power to hold a person in contempt of court by summary process is 'arbitrary in its nature and liable to abuse...', Ex Parte Terry, 128 U.S. 289, 313 (1888). The exercise of this power 'is a delicate one, and care is needed to avoid arbitrary or oppressive conditions.' Cooke v. United States, 267 U.S. 517, 539 (1925). The courts have, therefore, limited the power to impose summary punishment for contempt to 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat (19 U.S.) 204, 231 (1821)."

In terms of concepts developed, words used and authorities cited, Petitioner, in all courts, has asserted his claimed right to a hearing. (f.n.) The Attorney General's argument is reduced to the claim that in subtitling

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f.n. Judging by the opinion of the Kentucky Court. Petitioner Taylor also did not separately raise the "right to a hearing" point. Taylor v. Hayes, 494 S.W. (2d) 737.

his Argument Petitioner has only referred to a "Hearing" before another judge. In other words, he should have broken it up and said due process required (a) a hearing, and (b) this hearing before another judge.

Even the Common Law at its most technical would not be so demanding. We also point out the obvious ambiguity (necessary ambiguity) involved in any requirement to formulate "issues" or "questions for review", or "points of appeal." This Honorable Court's rule on the subject is contained in Rule 23, (1)(c).

We believe that a fair reading of all Supreme Court decisions prior to Taylor, shows an integration of the "right to a hearing" and the "right to an unbiased judge" (or "embroilment").

The Attorney General's entire argument is a truly extreme example of elevating form over substance.

Respectfully submitted,

Fay Stender

EXHIBIT A

SUPERIOR COURT

FOR THE COUNTY OF SONOMA

STATE OF CALIFORNIA

PETITION FOR WRIT OF
HABEAS CORPUS

IN RE AUBREY GROSSMAN:

WHEREAS, AUBREY GROSSMAN, attorney for Defendants in People v. Gary Stra, et al., #34644, 34746, 34751, is being held in custody under a 5-day jail sentence for direct contempt of court, for for acts allegedly committed during the course of trial of the aforesaid case on November 19, 1971; and

WHEREAS, the Judge, Honorable James E. Jones, Jr., cited said Aubrey Grossman for criminal contempt without a hearing despite a demand and refusal of same; and

WHEREAS, the order of contempt was reserved until the close of trial, and entered on November 23, 1971; and

WHEREAS, said Aubrey Grossman is being held unlawfully and without just and sufficient cause, and without a publication,

NOW, THEREFORE, Petitioner prays that a writ of habeas corpus be granted directed to the Sonoma County Sheriff, commanding him to have the body of Aubrey Grossman brought before this Court immediately and that he be restored to his liberty.

DATED: November 23, 1971.

/s/ Warren Wilson

/s/ Rex Sater

Attorneys for Aubrey Grossman